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No. 20770

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

3429

V. 3429

UNITED SHOPPERS EXCLUSIVE, a)
California corporation;)
MANFREE, INC., a California)
corporation,)
Appellants,)
vs.)
GENERAL ELECTRIC COMPANY, a)
New York Corporation, et al.,)
Appellees.)

Appeal from the United States District Court for
the Northern District of California
OPENING BRIEF OF APPELLANTS

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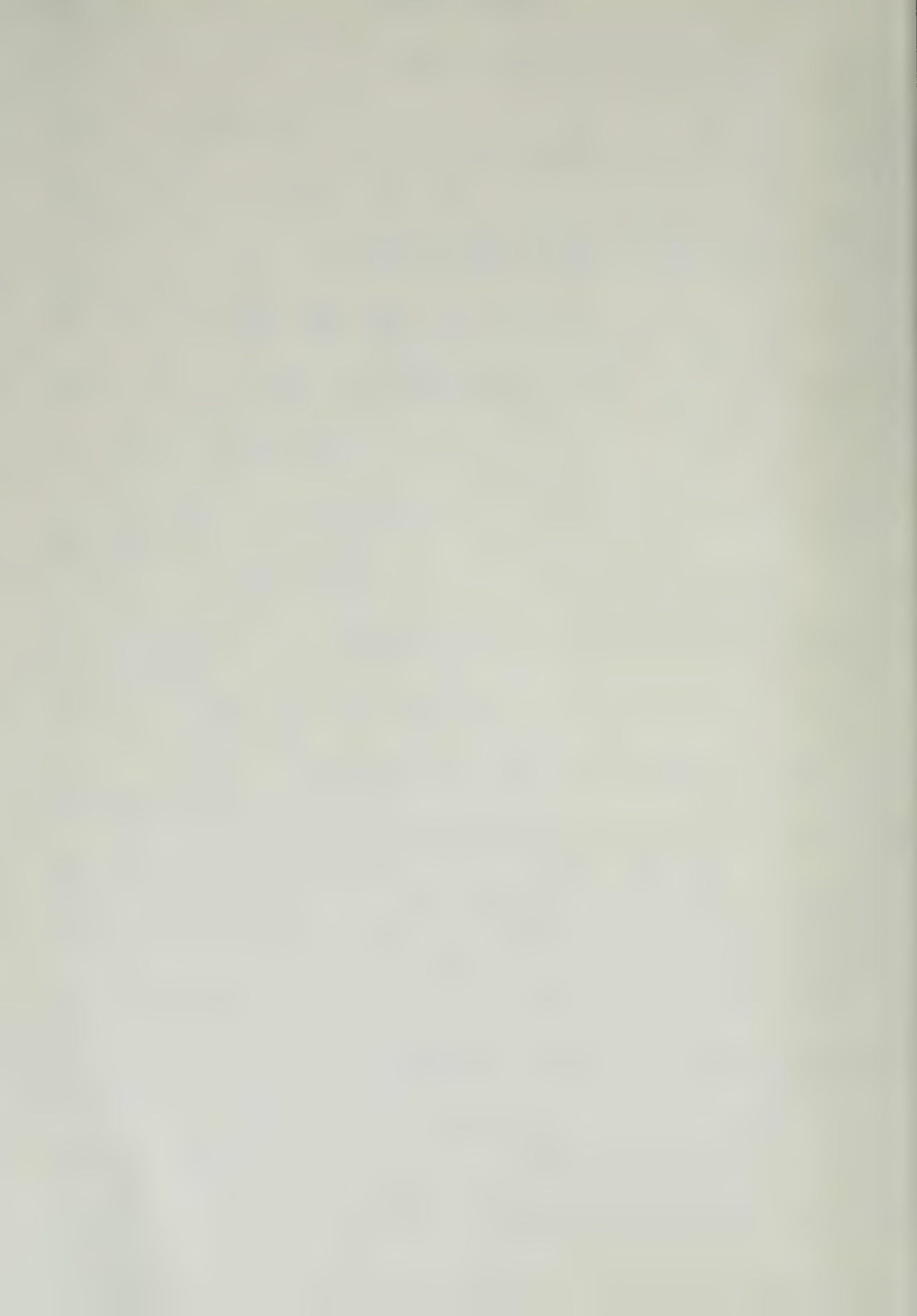
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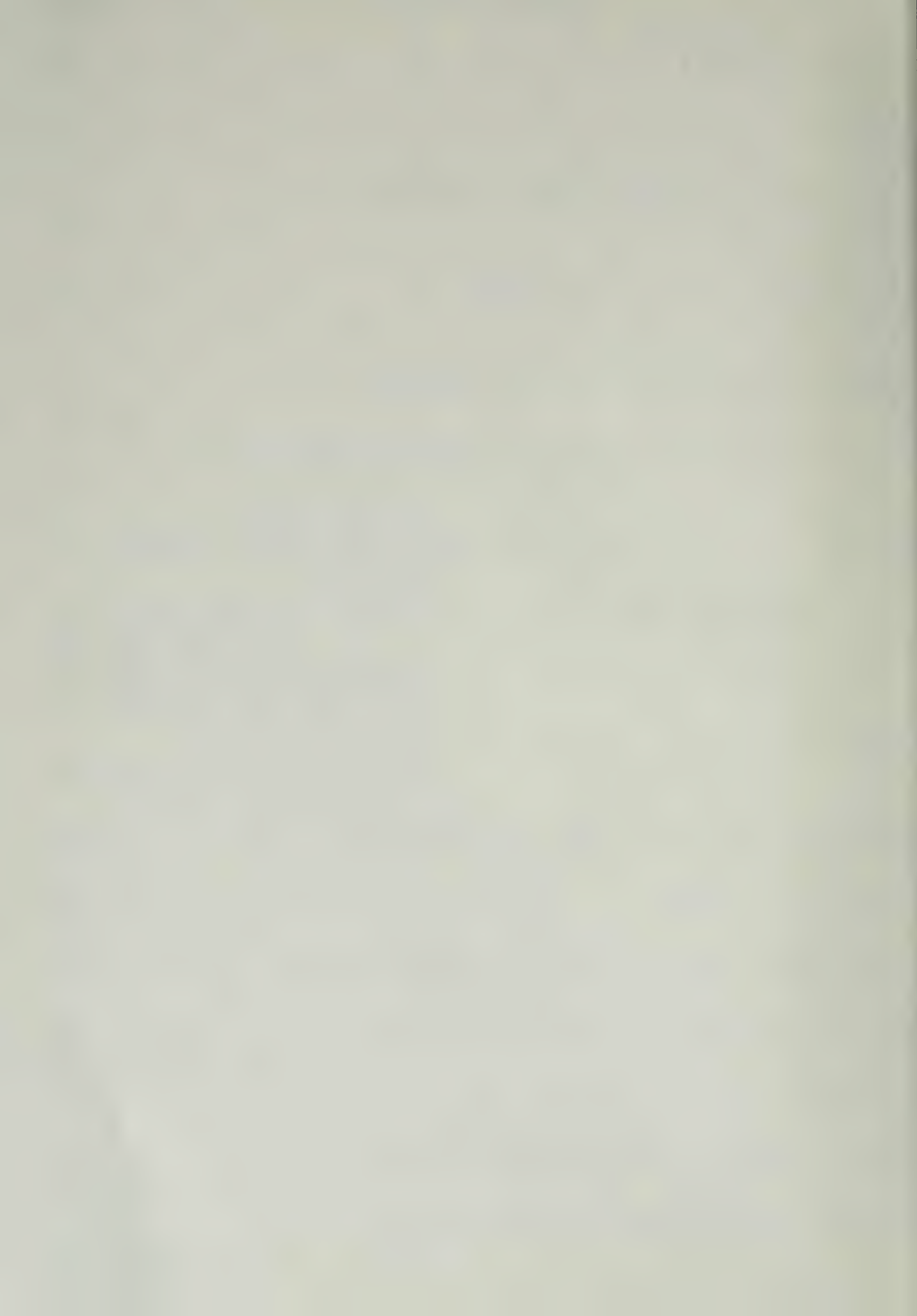
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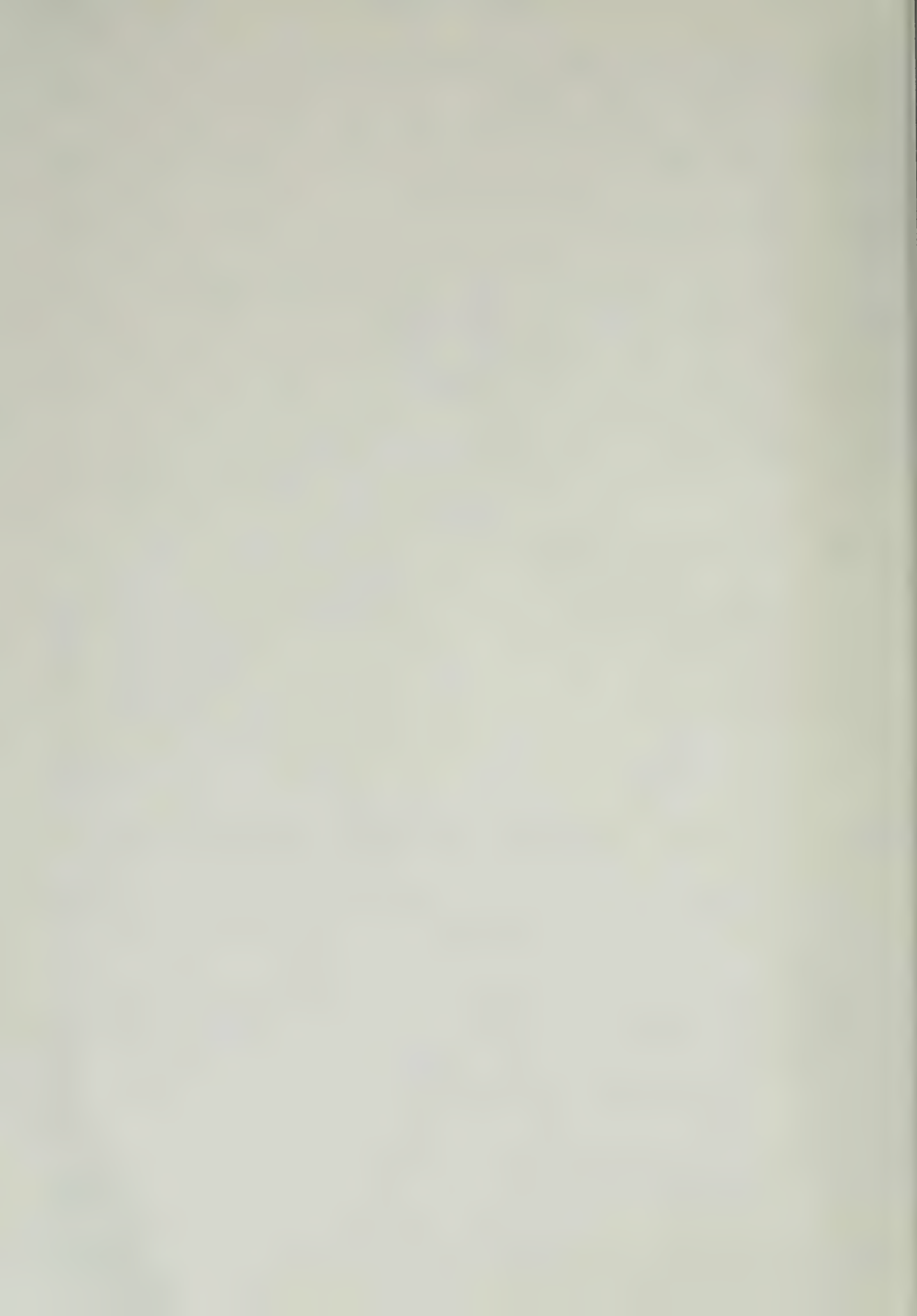
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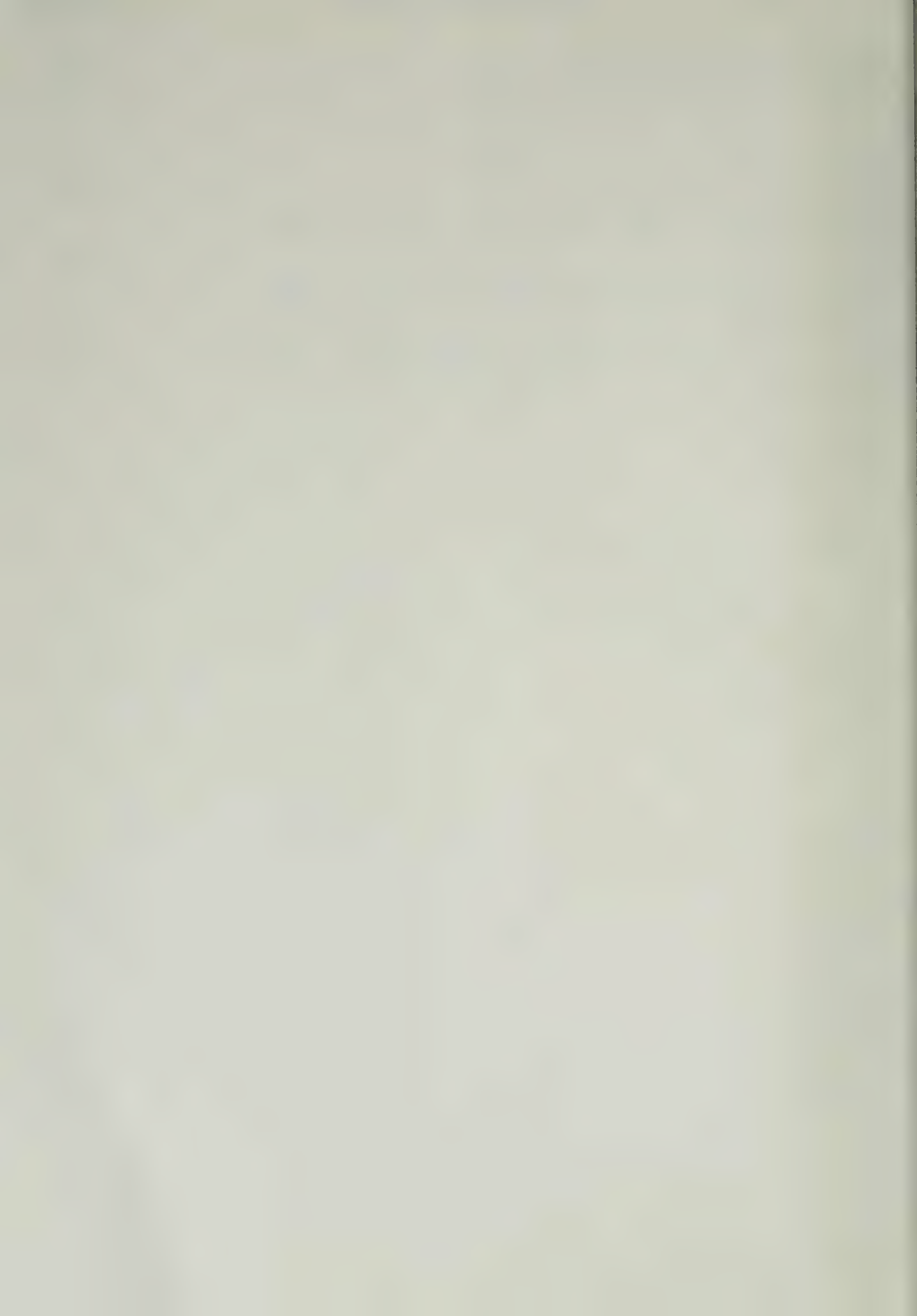
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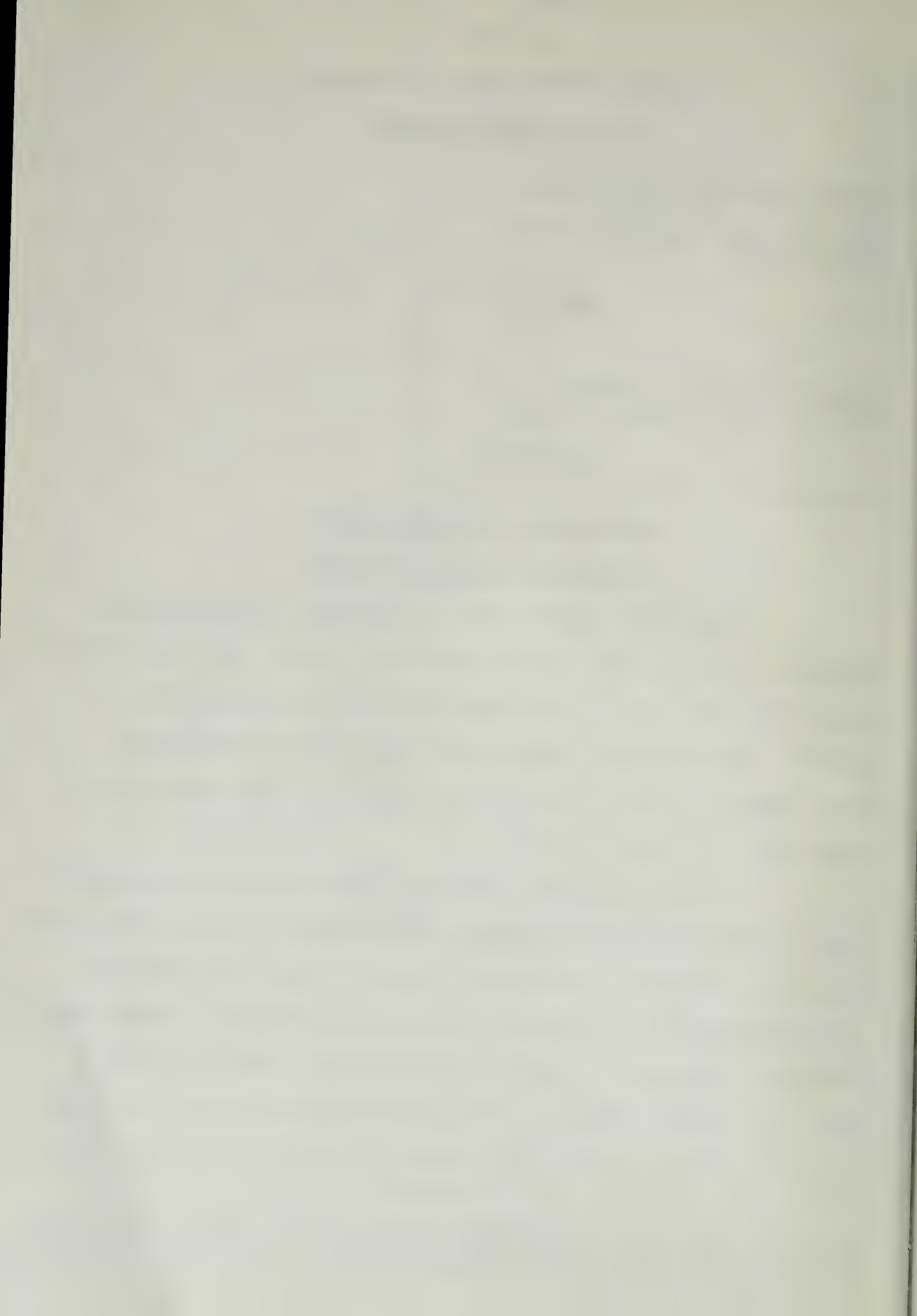
APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a judgment dismissing two complaints which were consolidated for trial. The complaints were filed and the proceedings instituted by appellants against appellees and others under the Federal Antitrust laws, specifically 15 U.S.C. §§ 15 and 16. The complaints appear at R. 1 and R. 15.^{1/}

The actions were tried in the United States District Court for the Northern District of California, before Honorable Alfonso J. Zirpoli and a jury. Prior to trial the actions were dismissed as to certain original defendants. Thereafter they were referred to as "co-conspirators" (see Pre-trial Order of July 8, 1965, R. 1431, 1476) and will be so referred to here. After a trial of 38 days, judgment was entered for all

^{1/} Appellants will hereinafter refer to the Clerk's Record as "R. and the transcript of the trial proceedings as "Tr." Transcripts of pre-trial hearings will hereinafter be referred to as "P.Tr."



appellees by the District Court, on motions by each appellee, and an order was entered dismissing the complaints (R. 1977).

Appellants thereafter appealed (R. 2048). After this appeal was docketed, this Court upon appellants' motion, dismissed appellee Broadway-Hale Stores, Inc. (hereinafter co-conspirator Hale) as an appellee in this case, by its order filed on April 4, 1967.

This Court has jurisdiction to review the judgment under 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF THE CASE

A.

Nature of the Case

Appellants allege that the appellees and co-conspirators violated Sections 1 and 2 of the Sherman Act, (15 U.S.C., §§ 1 and 2).^{2/} Appellant United Shoppers Exclusive (U.S.E.) was and is a retail discount department store, which, at the times involved, operated a store at 2850 Alemany Boulevard, San Francisco, California. Appellant Manfree, Inc. (Manfree) was and is a lessee of U.S.E., operating the major appliance and television concession at U.S.E.'s store. At all times involved, Manfree sought to sell major appliances and television sets at retail. The discount store operation is now well recognized in the United States retail industry, characterized by minimum overhead and correspondingly reduced retail prices over a broad range of consumer products.

Appellants seek treble damages under Section 4 of the

^{2/} Sections 1 and 2 of the Sherman Act are set forth in Appendix D.

3/
Clayton Act (15 U.S.C. § 15), and injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26). Basically, they have alleged that they were the subject of a group boycott, organized in response to the anticipated competitive impact of their price-cutting sales policy upon the San Francisco retail market for the particular products involved. As a result of that boycott, Manfree was unable to obtain most of the leading brands of the subject products from the vendor appellees and their co-conspirators. This condition existed at the time of the filing of the first complaint, August 12, 1960 (R. 1), and Manfree remained unable to obtain such products from such companies at the filing of the second action four years later, on August 4, 1964 (R. 15). U.S.E. was unable to advertise at all, during the period of 1957 to 1960 in the morning newspapers in San Francisco: the San Francisco Examiner, and the San Francisco Chronicle. Of course, appellants were never able to advertise the brands of products involved denied to Manfree. U.S.E. was also injured by reason of lost rentals under its percentage lease with Manfree, as the latter was virtually without the leading brands of major appliances and television sets for approximately seven (7) years, as a direct result of the illegal boycott imposed against it.

B.

The Complaints

The complaints charged that the appellees and co-conspirators unreasonably restrained interstate trade and commerce, and conspired to monopolize such trade and commerce in San

3/ Section 4 of the Clayton Act is set forth in Appendix D.



Francisco, California, in that:

a. The defendants operating retail stores agreed to fix retail prices on major appliances and television sets in San Francisco, California, and each defendant manufacturer and its distributor for the San Francisco market area refused to supply such products to Manfree, in order to support such price-fixing scheme.

b. Vendor defendants refused to sell the subject products to retail stores in San Francisco who would not abide by the price-fixing agreement.

c. Vendor defendants agreed to refuse to sell the subject products to retailers in San Francisco operating as "discount stores".

d. Vendor defendants favored and protected the retail stores operated by members of the conspiracy, by offering and allowing them special price and advertising terms and advantages not offered to competitive stores.

e. The retail store-operating defendants agreed to bring the pressure of their combined advertising-purchasing business to bear upon the major newspaper publishers in San Francisco, California, in order to prevent appellants from being allowed to advertise in these newspapers.

f. Defendants and co-conspirators agreed, and acted pursuant to such agreement, to eliminate Manfree from active competition in the sale of the subject products, and sought to prevent the successful operation of all departments of U.S.E.

g. Retail store-operating defendants entered into various non-competitive arrangements with each other, and sought

to allocate among themselves the business of retailing major household appliances and television sets in San Francisco. The vendor defendants agreed to boycott appellants in the distribution and sale of such products, and in implementation thereof, uniformly refused to sell these products to Manfree.

The complaints specifically alleged that co-conspirator Hale enjoyed monopolistic buying power in the State of California, and used that buying power to deny to appellants the competitive position they could have otherwise obtained in the purchase and sale of the products manufactured and distributed by the vendor defendants in a free and open market, by threatening to discontinue its sales of such products obtained from these vendors, unless such companies refused to sell their products to Manfree (R. 1, 8-12; 15, 20-24).

The complaint filed in August, 1960, (No. 39,336 below), specified that from May, 1957, to the date of the filing, appellants experienced continuing difficulty in obtaining major appliances and television sets; and that as of August, 1960, Manfree was unable to obtain any of the major products sold and distributed by the vendor appellees and co-conspirators, although it had repeatedly requested such products, and had been fully able, ready, and willing to order large shipments of such merchandise.

Manfree prayed for damages arising from its loss of profits, goodwill, reputation and prestige amounting to the sum of \$500,000.00.

U.S.E. prayed for damages in the amount of \$200,000.00 arising from its loss of profits, goodwill, reputation and



prestige.

The complaint filed on August 4, 1964 (No. 42,674 below), contained substantially the same allegations as the previous complaint. It did not name Sylvania Electric Products, Inc., Westinghouse Electric Supply Co., or Frank H. Edwards Co. as defendants, and added Callectron, Norge Sales Corporation, and Zenith Sales Corporation as defendants.

The 1964 complaint asked for additional damages in the sum of \$600,000.00 for Manfree, and \$200,000.00 for United Shoppers Exclusive, as a result of the continuation of the illegal boycott. Plaintiffs continued their demand for injunctive relief.

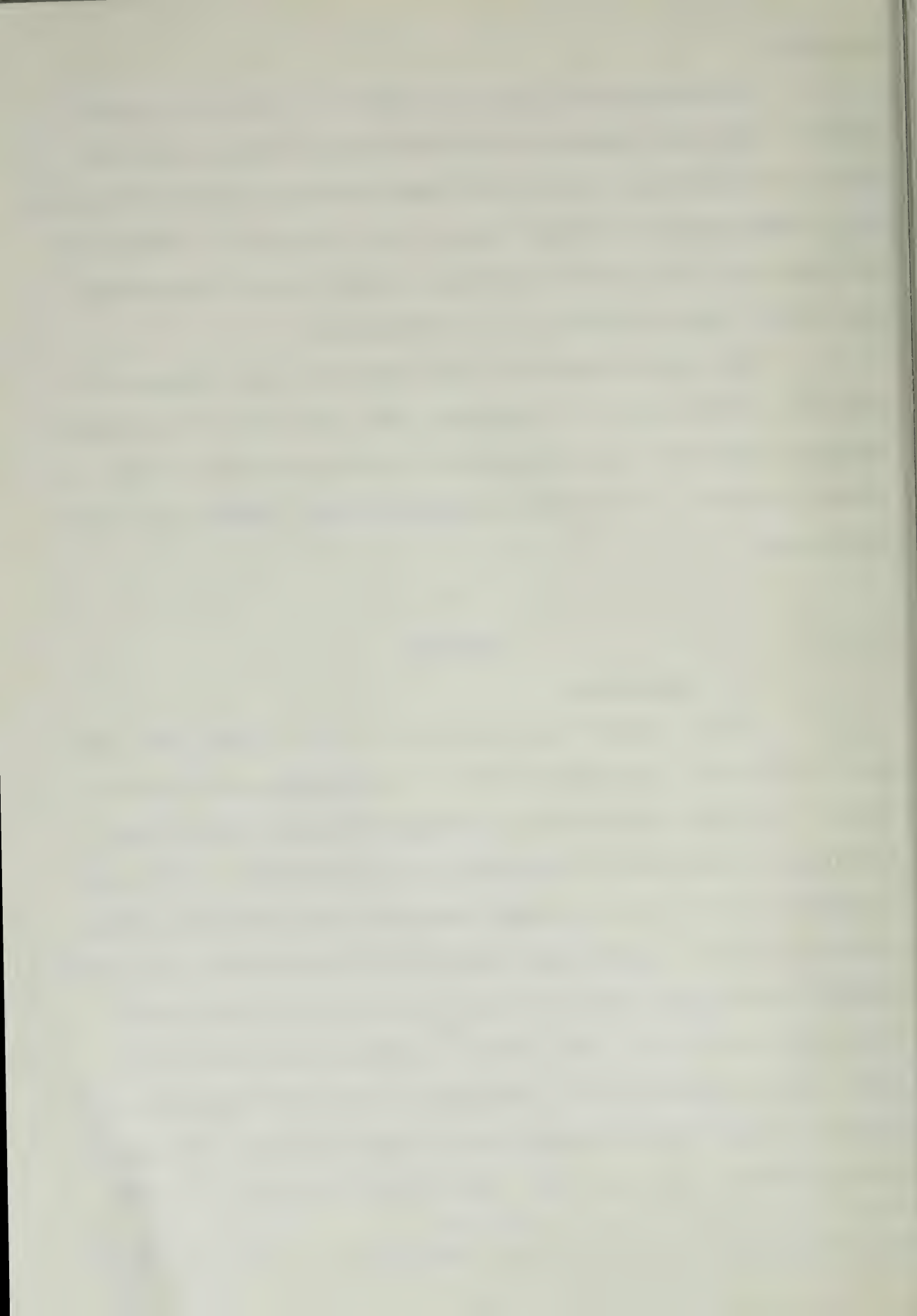
C.

Parties

1. Plaintiffs:

U.S.E. opened for business in March, 1957, as a membership discount department store. A membership card with a fee of \$2.00 was required of a prospective customer to gain admission. This policy was abandoned in September, 1961, and thereafter cards were no longer required for admission. When the store opened, membership cards were available to the public for an introductory three-week period (Tr. 5707-5708; 6052; 6196-6201; see Pl. Ex. No. 4038).^{4/} After this period and until about January, 1960, membership cards were allowed to members of any general group such as labor unions, veterans, and government employees (Tr. 5707-5708; 6201-6202). Cards

^{4/} Plaintiffs' Exhibits will be referred to as "Pl. Ex. No."



were also available to the family and friends of any member (Tr. 6199; 6204-6205). About January, 1960, membership cards were made available to the public (Tr. 6203-6204).

The U.S.E. store premises contain approximately 30,000 square feet of floor space, and had most of the departments customary to large department stores. It leased the major appliance, television, and hi-fidelity phonograph concession to Manfree on the basis of a fixed flat rental fee, plus a percentage of the gross receipts on the sale of such items. (Tr. 5710-5711; 6018-6019; 6027; Pl. Ex. No. 5017).

2. Defendants:

The present appellees before this Court are:

(1) California Electric Supply Company (California Electric) was at all times concerned a distributor of Philco major appliances and television sets (Pl. Ex. Nos. 55 and 59; Tr. 3621-3631; 3664-3667). Hale also served as an "associate" distributor of Philco major appliances and television sets in the San Francisco market area. (Pl. Ex. Nos. 295, 296, 297, 298 and 299). California Electric claims that it ceased to distribute Philco major appliances to retailers as of January, 1963, while continuing distribution of such products to builders. (Tr. 3665-3666; 3765).

(2) Frigidaire Sales Corporation (Frigidaire) distributes major appliances manufactured by the Frigidaire Division, General Motors Corporation. (Tr. 4205-4208; Pl. Ex. No. 36; Tr. 4292-4295).

(3) General Motors Corporation is a defendant herein through its Frigidaire Division (Frigidaire). (Pl. Ex. Nos. 35



and 36).

(4) General Electric Company (G.E.) distributes major appliances and television sets. Such G.E. products are distributed in Northern California through the Northern California District of the General Electric Major Appliance Division, headquartered in Burlingame, California. G.E. major appliances and television sets are manufactured by the General Electric Major Appliance Division in Louisville, Kentucky. G.E. at all times involved also manufactured such products through its Hotpoint Division, under the "Hotpoint" brand name. (Tr. 4129-4131; 4390-4391; 4425; Pl. Ex. No. 547A).

(5) Hotpoint Division of General Electric Company (Hotpoint) was sued separately as a defendant. During at least the period 1957 through 1959, Hotpoint also manufactured television sets. It distributed major appliances and television sets in Northern California through co-conspirator Graybar Electric Co. (Graybar). (Pl. Ex. Nos. 31, 32, 33 and 34).

(6) Maytag West Coast Co. (Maytag West Coast) distributed major appliances, principally home laundry equipment, washers and dryers, manufactured by appellee The Maytag Company (Maytag). (Pl. Ex. No. 134). Maytag West Coast is wholly owned by Maytag (Tr. 3307)

(7) Maytag has total operating control of Maytag West Coast. (Tr. 3479-3482).

(8) Borg-Warner Corporation (Borg-Warner) is the manufacturer of Norge brand household appliances. Norge appliances are distributed in Northern California by co-conspirator W. J. Lancaster Co. (Lancaster) (Pl. Ex. Nos. 46, 47 and 48).

At the time the original complaint was filed in August, 1960, Borg-Warner owned and totally directed the operations of appellee Norge Sales Corporation (Norge Sales). The president of Borg-Warner, Norge Division, was the president of Norge Sales, and Borg-Warner officers and directors were on the Board of Directors of Norge Sales (Tr. 2484-2504; 2511-2515; 2517-2519; 5366-5369; 5384). The Court below assumed, in deciding this case, that Borg-Warner would be fully responsible for the activities of Norge Sales in the context of the matters alleged in the complaints. (R. 1912, 1962). During most of the period involved, Norge major appliances were distributed in Southern California by Graybar (Tr. 2389; 5369-5373), the distributor of Hotpoint appliances in Northern California. By 1963, the distributor of Norge appliances in Southern California was J. N. Cezan Co. (Pl. Ex. for Id. No. 1774).^{5/} The Northern California distributor of Norge appliances, Lancaster (Tr. 2357-2358), also distributed Motorola television sets. (Tr. 2357-2358, 2393).

(9) Norge Sales Corporation (Norge Sales) was an entity created to market the Norge-brand appliances manufactured by appellee Borg-Warner (Norge Division). As noted above, it was effectively fully owned and controlled by Borg-Warner. Norge Sales was not named as a party defendant in the original complaint, but was joined as a defendant in the action filed in 1964. Pursuant to a motion for summary judgment by Norge Sales based on the statute of limitations provisions of 15 U.S.C.

^{5/} Plaintiffs' Exhibits for Identification will be referred to as "Pl. Ex. for Id. No."



§ 15(b), the District Court filed its order on June 4, 1965, dismissing Norge Sales as a defendant (R. 165-166). The Court expressly did not direct and determine that its order was a final judgment pursuant to F.R.C.P. Rule 54(b). (See Pre-trial Hearing, July 6, 1965, P. Tr. 64).

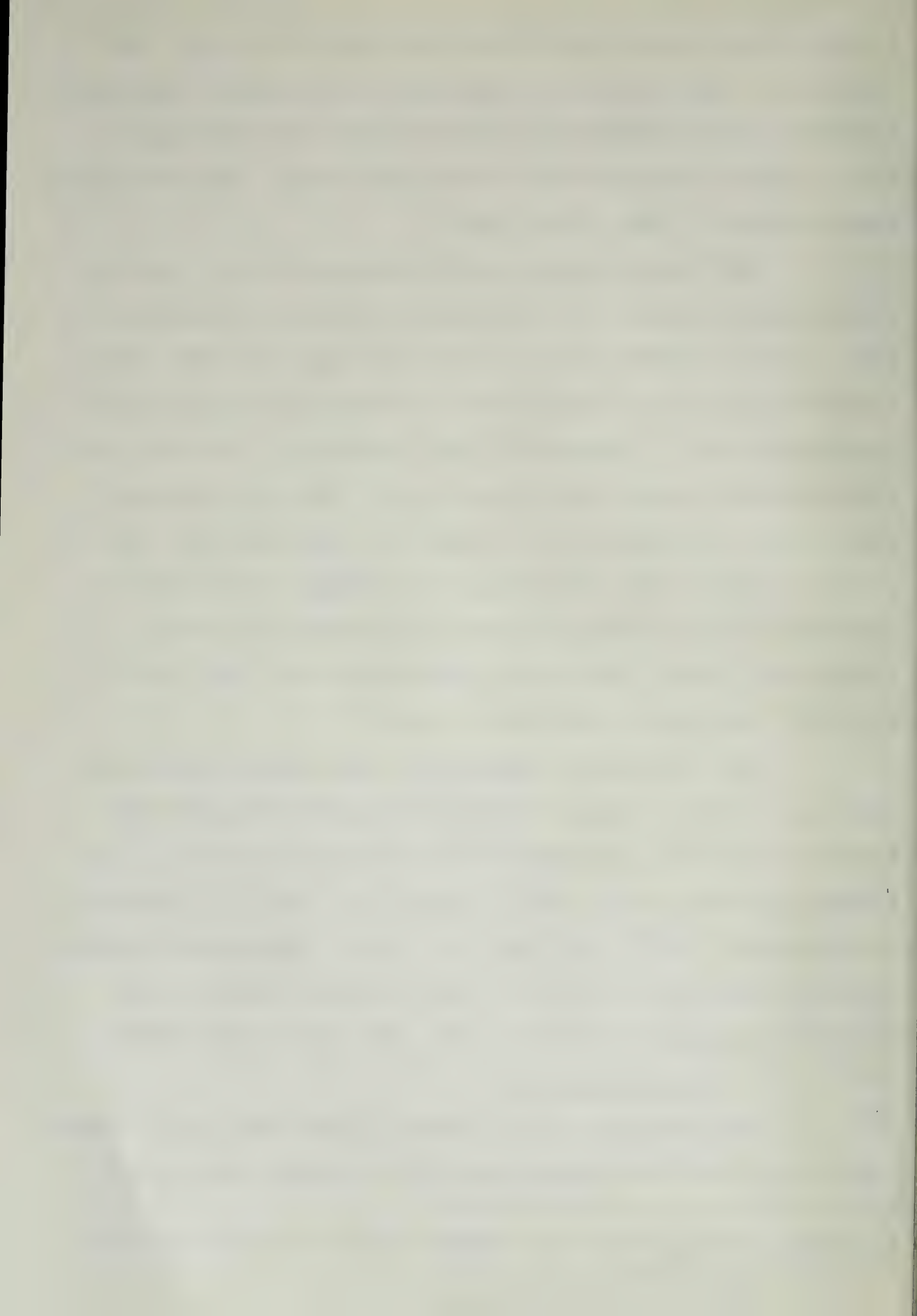
(10) Radio Corporation of America (R.C.A.) was involved herein through its manufacture and sale of television sets. Prior to 1957 and thereafter until May 31, 1964, R.C.A. television sets were distributed in Northern California by co-conspirators Leo J. Meyberg Co., and later as A. H. Meyer Co., its successor company, and after May 31, 1964, by Callectron, Inc., which had acquired A. H. Meyer Co. (Pl. Ex. Nos. 88, 90 and 91). R.C.A. also distributes television sets in various areas of the United States, including Southern California, through RCA Victor Distributing Corporation (Pl. Ex. for Id. No. 1702; and see Tr. 4672-4673, 4685).

(11) Whirlpool Corporation (Whirlpool) manufactures major appliances. During the time concerned Whirlpool distributed its major appliances in the same way as R.C.A., i.e., through co-conspirators Leo J. Meyberg Co. or A. H. Meyer Co., and Callectron, Inc.^{6/} (Pl. Ex. No. 5081). Appellants offered to prove that R.C.A. had two of its officers serving on the Board of Directors of Whirlpool (Pl. Ex. for Id. No. 5086).

3. Co-Conspirators:

The complaints as originally filed named as defendants the distributors and manufacturers of the above-named major

^{6/} These co-conspirators (in effect the same company) will be referred to as "Meyer".



appliances and television sets, and four other leading manufacturers of such products:

a. Zenith products: Zenith Radio Corporation (Zenith), manufacturer, and H. R. Basford Co. (Basford), distributor.

b. Motorola products: Motorola Corporation (Motorola), manufacturer, and W. J. Lancaster Co., distributor.

c. Sylvania products: Sylvania Electric Products, Inc. (Sylvania), manufacturer, and Frank L. Edwards Co., distributor.

d. Westinghouse products: Westinghouse Electric Corporation, manufacturer, and Westinghouse Electric Supply Co., distributor (Westinghouse).

Appellants also named as defendants certain major furniture or department stores retailing major appliances and television sets in San Francisco: R. H. Macy Co. (Macy's), Lachman Bros., Redlick-Newman Co. (Redlick), Sterling Furniture Co. (Sterling) and former appellee, Broadway-Hale Stores, Inc. (Hale).

At the times involved Hale was a department store operator and retailer of major appliances and television sets. It operated 13 retail stores in Northern and Southern California (R. 146). At the time U.S.E. opened, and until January, 1963, the Hale Division of Broadway Stores operated five appliance stores in Northern California; three in San Francisco, one in Sacramento, and one in San Jose. All the appliance stores except the one in Sacramento were closed on January 31, 1963 (R. 157). These stores sold approximately \$4,000,000.00 in appliances and television sets annually (Tr. 441). Hale also



owned Dohrmann Commercial Company which leased the major appliance concessions at the various "Emporium" stores in San Francisco and elsewhere (Tr. 301; Pl. Ex. No. 4269, Answer No. 15). Hale also has owned approximately 24-1/2 percent of the stock of Emporium-Capwell Company, operator of the Emporium stores and Capwell stores in Northern California (Tr. 310).

Appellants named the morning newspapers published in San Francisco, the San Francisco Examiner and the San Francisco Chronicle as co-conspirators; and also named certain trade associations in which the above-named defendants and co-conspirators were members as co-conspirators. (R. 1435, Tr. 2198-2199).

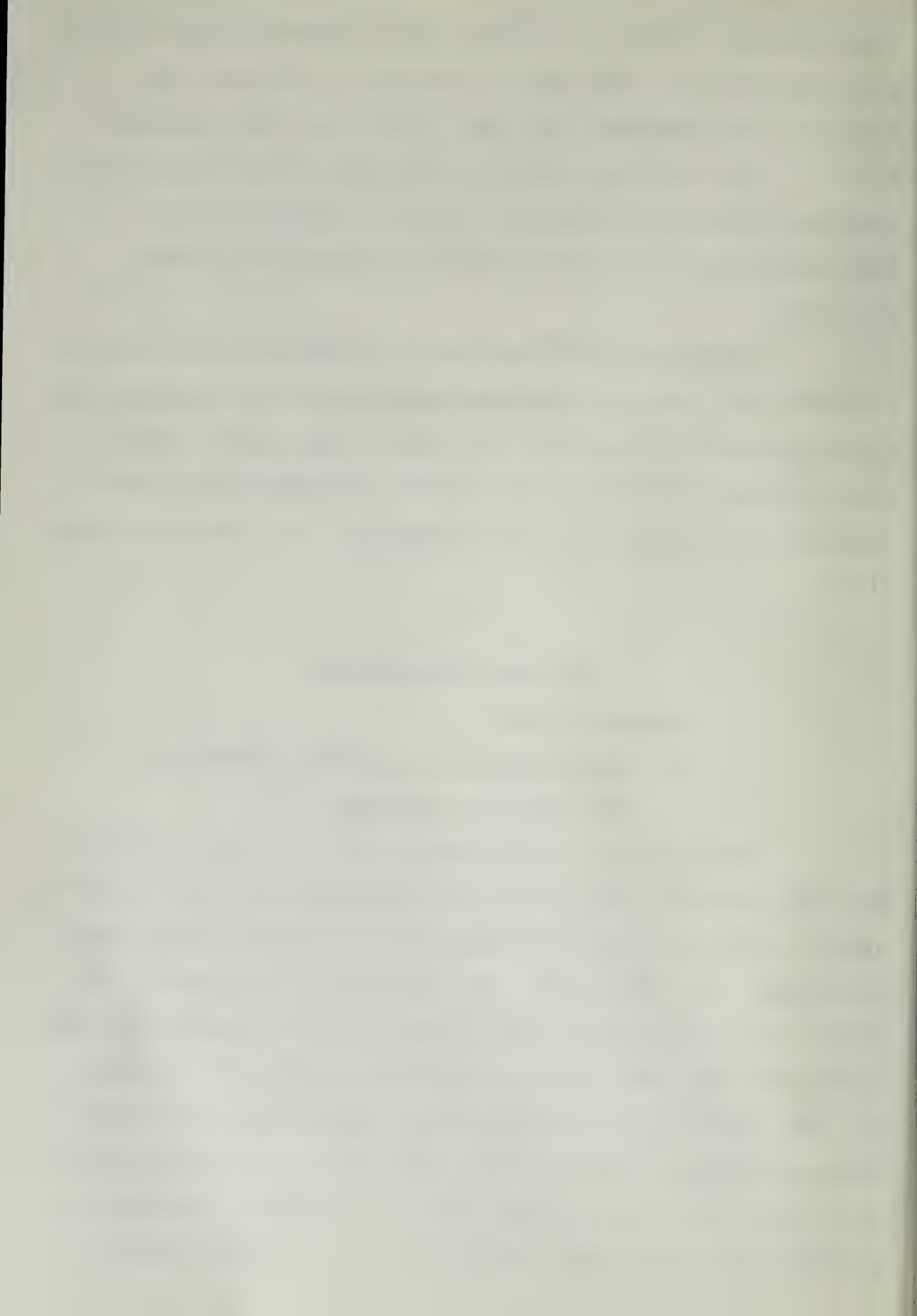
D.

Pre-trial Proceedings

1. Pre-trial Order

a. Order Requiring a Separate Verdict on The Issue of Liability:

The Pre-trial Order filed August 13, 1965 provided that the issue of liability must be determined by way of special verdict before the issue of damages would be tried before the same jury. (R. 1608-1609). The appellees had contended in their pre-trial statement that there should be separate trials, before the same jury, on the issues of liability and damages (R. 1103, 1123). This was opposed by appellants, (Pre-trial Hearings of May 27, 1965, P.Tr. 4-12, 5-21, 23-25; and July 6, 1965, P.Tr. 127-132), and they filed a memorandum opposing appellees' suggestion that there be a special verdict on the



liability issue (R. 1311). The appellees submitted their memorandum in support of such a ruling (R. 1334), and on July 6, 1965, the Court ordered a separate trial on the issue of liability (P.Tr. 50).

Thus, the trial below did not involve any evidence relating to damages. The Pre-trial Order went so far as to exclude exhibits showing loss of sales and profits to appellants, which they contended were relevant, on the issue of liability. (Pl. Ex. for Id. No. 1500-1); Tr. 6363-6364).

b. Order Limiting Triable Issues to Single Conspiracy to Boycott Appellants, and Conspiracy to Monopolize by Boycott:

Appellants' complaints clearly and specifically allege that the co-conspirator Hale had utilized its substantial buying power to obtain competitive advantages in the relevant market, and to deny to appellants their rightful competitive position in the purchase and sale of products distributed by each vendor appellee and conspirator. (R. 1, Paragraph 10; R. 15, Paragraph 10).

Appellees in their pre-trial statements stated that the issues framed by the pleadings involved only a conspiracy in restraint of trade (R. 1103, 1106, 1112, 1118-1119). The Court requested appellants to make an offer of proof as to the existence of a vertical conspiracy entered into by and between Hale, the retailer defendant, and each manufacturer and distributor defendant or co-conspirator; for example, by Hale (retailer), California Electric (distributor), and Philco (manufacturer). Accordingly, appellants filed their Offer of Proof (R. 1481).



Appellees filed a memorandum in opposition. (R. 1576).

The Court entered a separate Pre-Trial Order on August 13, 1965, limiting the issues to be tried to solely a horizontal conspiracy in restraint of trade and a horizontal conspiracy to monopolize interstate trade and commerce. (R. 1608-1609).

Thus, the Court's determination that the complaints failed to put in issue the liability of the appellees and co-conspirators to the appellants except on restricted grounds stated in the Order, specifically excluded any consideration of an existence of separate vertical price-fixing conspiracies, as follows:

Philco Products: Hale and appellee California Electric, and co-conspirator Philco.

General Electric products: Hale and appellee General Electric.

Hotpoint products: Hale, appellees General Electric, Hotpoint, and co-conspirator Graybar Electric Co.

Frigidaire products: Hale, and appellee Frigidaire.

Norge products: Hale, appellees Borg-Warner (Norge Division) and Norge Sales, and co-conspirator Lancaster.

Maytag products: Hale, appellees Maytag West Coast, and Maytag.

R.C.A. products: Hale, and appellee R.C.A., and co-conspirator Meyer.

Whirlpool products: Hale and appellee Whirlpool, and co-conspirator Meyer.



c. Separate Judgment Regarding Norge

Sales Corporation:

The first complaint did not name Norge Sales as a defendant but the second complaint did. (R. 1, 15). On May 17, 1965, Borg-Warner and Norge Sales each filed motions for summary judgment (R. 1079). Appellants opposed these motions (R. 1241). Argument on the motions was held on May 29, 1965, and the Court ordered summary judgment in favor of Norge Sales, on the ground that the applicable Statute of Limitations (15 U.S.C. § 15(b)) had run as to any claim under the antitrust laws against that company. The decision was based on the grounds that Norge Sales had not been sued within four years from the alleged beginning of the conspiracy to which they were a claimed party. (R. 165-166). Appellants moved for a reconsideration of the Order, on June 7, 1965. The Court denied the motion, and entered summary judgment in favor of Norge Sales on June 14, 1965 (R. 165).

2. Discovery Orders

Despite repeated efforts, appellants were unable to obtain all memoranda, reports or notes pertaining to meetings among two or more defendants concerning or relating to appellants, because of unduly limiting pre-trial discovery orders:

a. As to appellee R.C.A.: The Court refused to enforce a subpoena duces tecum requiring Mr. D. Gentile, R.C.A.'s field sales representative in Northern California, to produce certain documents upon his deposition (R. 327a-332). Appellants filed a Motion for an Order to Show Cause as to why the documents identified in the subpoena should not be produced

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(R. 323-352), pointing out that the subpoena was duly served upon Mr. Gentile, yet no such documents were produced at his deposition, or at the depositions taken by appellees of other officers of R.C.A., Mr. Harold Maag and Mr. Fred Folsom, (upon whom similar subpoenas duces tecum were served.)

R.C.A. asserted that Mr. Gentile was an "employee" only, and could not be served with an effective subpoena requiring appellee to produce documents. (R. 372). The Court denied appellants' motion, and entered an order treating the subpoenas as a motion to produce documents under F.R.C.P. Rule 34; denying the production of any correspondence between R.C.A. and its distributor, co-conspirator Meyer, pertaining to appellants, which had been specifically requested in Item No. 5 (R. 328-330) of the subpoena. R. 413, 414.

Appellants thereafter filed a motion for the production of documents, pursuant to F.R.C.P. Rule 34, addressed to all the factory defendants (R. 422). Item 15 requested production of all intraoffice reports, memoranda or notes pertaining to or relating to appellants, or the retail defendants, during the period of January, 1957 to January, 1963 (R. 422, 425). The Court denied the motion as it concerned the production of these documents (Pre-trial hearing, August 7, 1964; P.Tr. 88-90).

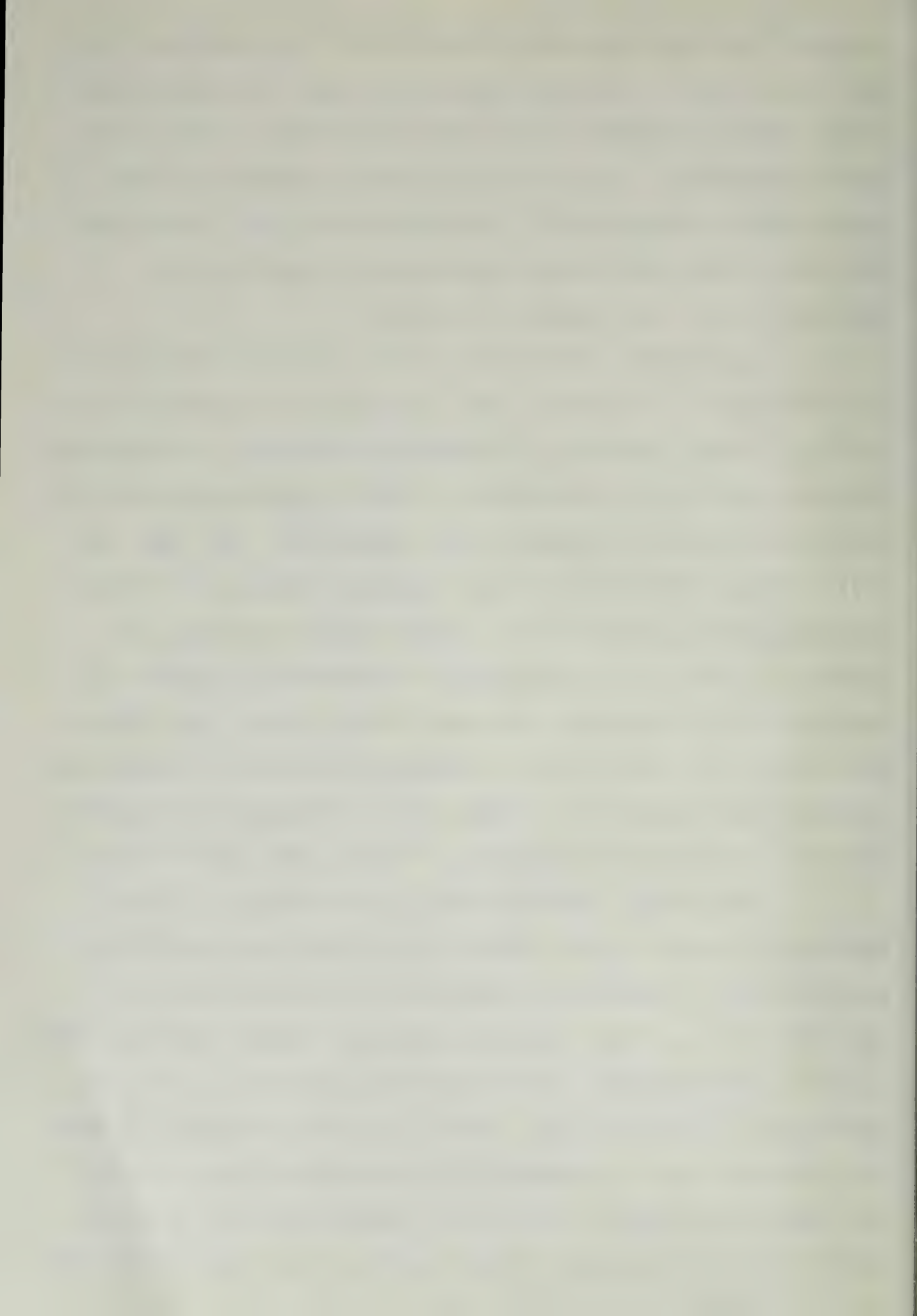
Plaintiffs further filed written interrogatories, pursuant to F.R.C.P. Rule 33, addressed to all the defendants (R. 625), which sought to determine whether or not any written statements or reports existed, reflecting any conversations between an employee, officer, agent, or representative of any



defendant (or any subsidiary or affiliate) and any other person, having to do with the acquisition, sale, or advertising of the subject products by (i) the appellants, or (ii) by the retail defendants. R.C.A. filed a partial answer (R. 646); after hearing on October 16, 1964 upon appellees' objections, the Court ruled that these interrogatories need not be answered (P.Tr. 6-10; Order at R. 671).

Appellants filed their interrogatories addressed to all defendants in December, 1964, seeking more specific statements as to the existence of documents reflecting conversations between agents of the defendants or their representatives concerning the matters covered by the complaints. (R. 790, 791-792). R.C.A. (R. 820) and other appellees objected to these interrogatories and the Court entered orders limiting the answers to facts of the existence of statements, reports or memoranda which expressly referred to appellants, and denying discovery of the existence of statements or reports concerning conversations between an attorney for a defendant, and another defendant, concerning appellants. (See R. 971, as to R.C.A.).

Appellants moved for the production of all correspondence received by the factory defendants from appellants, and any notes or memoranda concerning such communications (R. 745, 749, No. 20); for correspondence between these parties and their distributors, concerning their refusals to sell to appellants (R. 745, 750, No. 22(c)); for any documents concerning conversations or statements by representatives of any of the retail defendants as to prices, competition and other retailers in San Francisco, or the San Francisco Bay Area (R. 745,

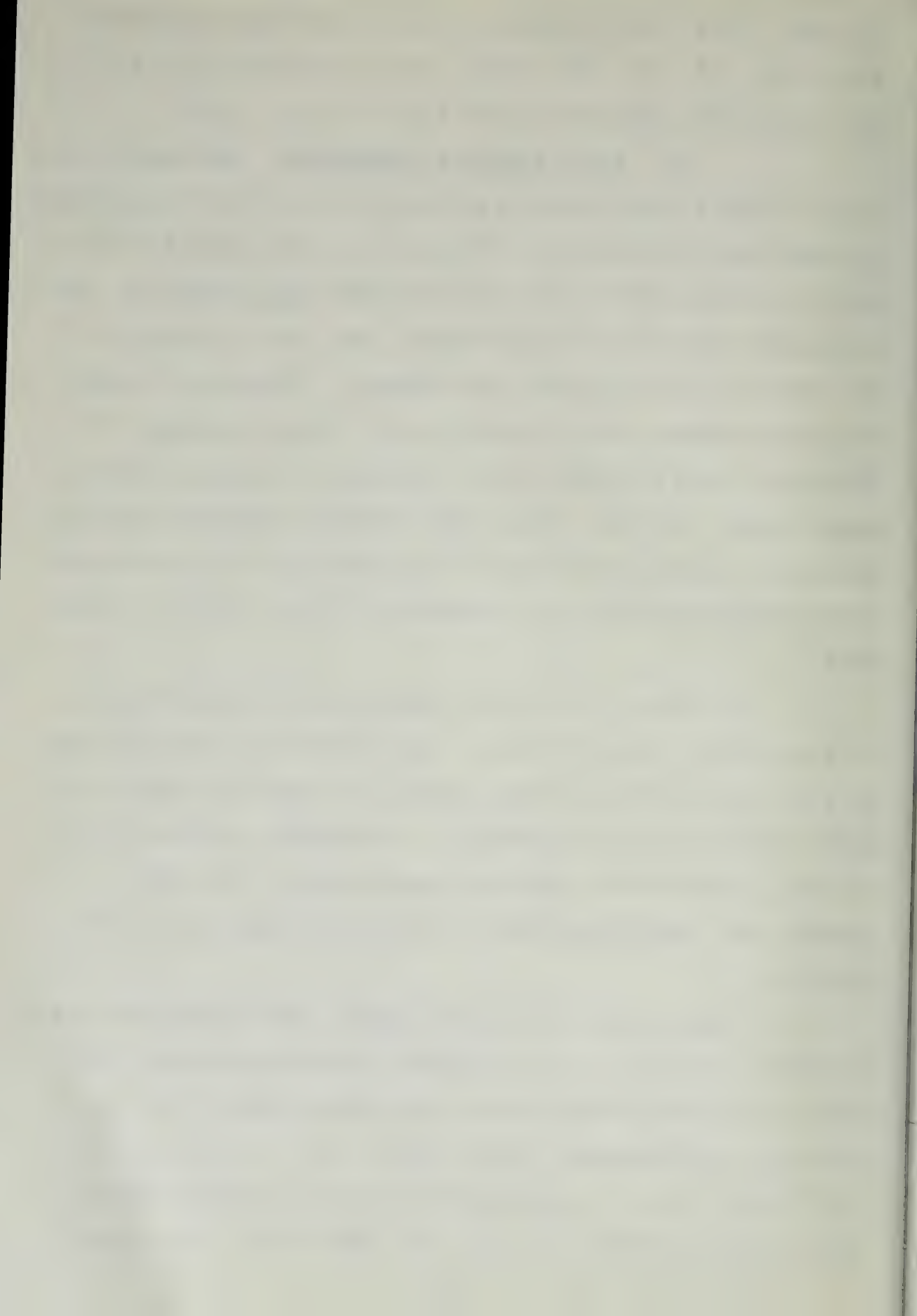


750, No. 22(d)); and concerning sales to discount department stores (R. 745, 750, No. 22(e)). The Court denied the production of such documents as to R.C.A. (R. 127, 129).

b. As to appellee Frigidaire: Appellants moved for an Order to Show Cause why documents should not be produced by appellee Frigidaire (R. 298-322), as it had failed to produce documents called for in the subpoena duces tecum (R. 302-307) served upon one of its managers, Mr. John C. Shaw, Jr., and took no steps to quash the subpoena. Frigidaire claimed that the subpoena was not served upon a "managing agent" of Frigidaire; and objected to the broadness of Items 11 and 12, among others (R. 353). Among the documents requested were all salesmen's reports pertaining to or relating to any conference with representatives of any defendant, or plaintiffs (R. 305-306).

~~_____~~ The Court limited the demand to reports pertaining to plaintiffs, discount houses, and agreements, understandings or policies concerning retail prices, or terms and conditions upon which retailer or distributor defendants purchased, received, or advertised household appliances (R. 419-420), adopting the precise position of appellee Frigidaire on the question.

Appellants continued to request the production of all salesmen's reports or field reports concerning meetings between Frigidaire and the retail defendants (Motion for the Production of Documents, filed June 5, 1964, Item 15, R. 422-425; Motion for the Production of Documents, filed November 17, 1964, Items 20, 22(c), (d), (e), R. 745-749-750; Plaintiffs'



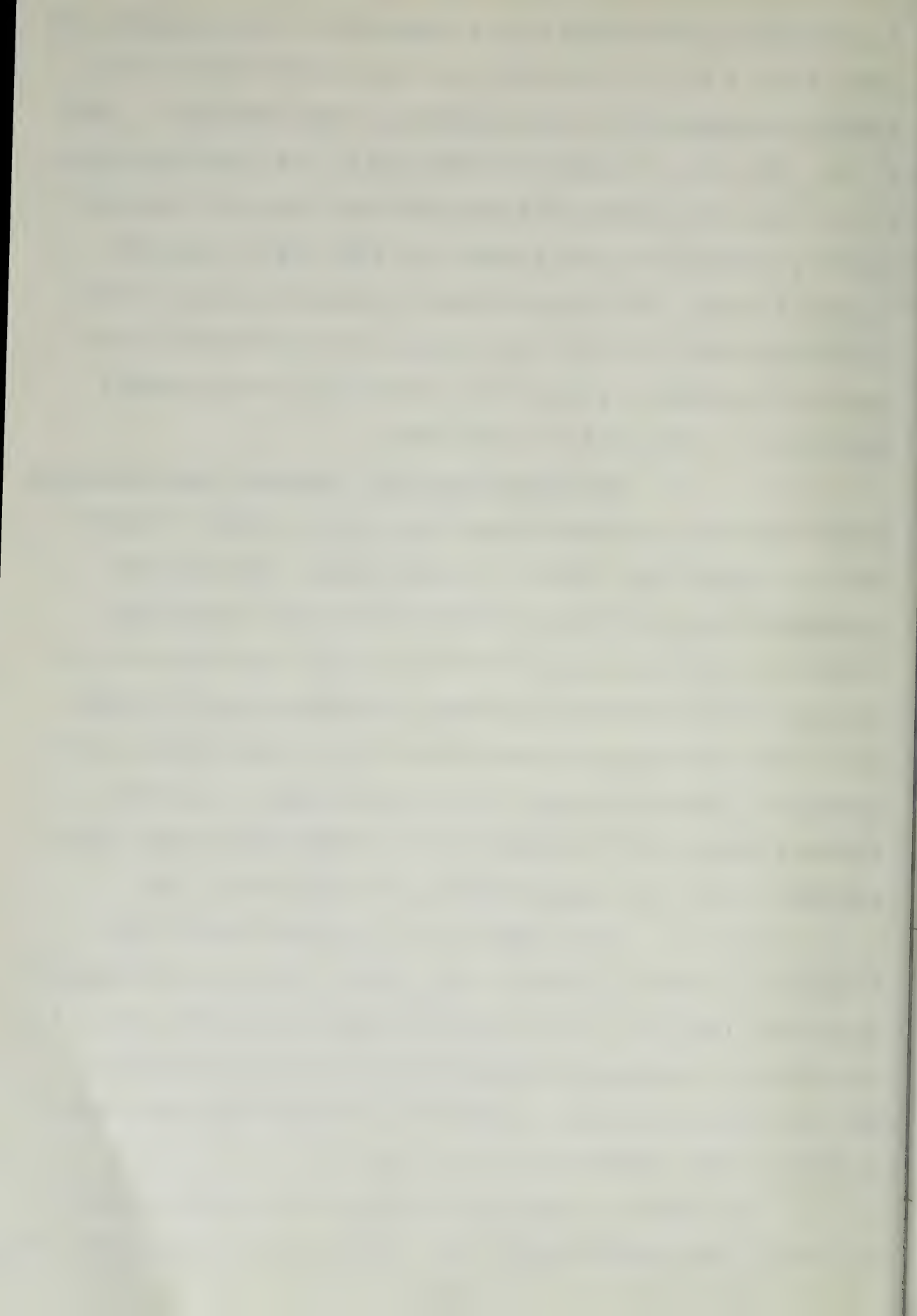
Interrogatories Addressed to All Defendants, filed September 29, 1964, Items 2 to 6, R. 625-626; and Plaintiffs' Second Interrogatories Addressed to All Defendants, filed December 7, 1964, R. 790, 791-792.) Frigidaire responded to the Interrogatories by claiming all reports have been produced, but also objected to the production of such reports (R. 648, 649 and 803-804; R. 540; R. 878). The Court refused to require answers to the Interrogatories (R. 671), or to require the production of reports by Frigidaire, pertaining to meetings with the retail defendants (R. 419, 615; R. 977, 980).

c. As to appellees G.E., Hotpoint, and Whirlpool:

These defendants objected to each and every attempt of appellants to obtain the reports of conversations between their representatives and representatives of Hale and other San Francisco retail stores; of letters to their distributors pertaining to requests from appellants to obtain their products; of conversations with representatives of Hale and other retail defendants concerning sales or the possibility of sales to discount stores; and of reports of conversations between their representatives and representatives of appellants. See:

(1) Item 15 of Plaintiffs' Motion for Production of June 5, 1964 (R. 422, 425), and G.E. and Hotpoint objections (R. 507); Item 15 of Plaintiffs' Motion for the Production of Documents Addressed to Distributor Defendants (R. 434, 437), and G.E.'s objections (R. 507); and the Orders entered (R. 672 (Hotpoint), R. 679 (G.E.)).

Whirlpool's objections to the motion for production of June 5, 1964 (above) at R. 524; order as to Whirlpool (R. 598).



(2) Plaintiffs' Interrogatories to all defendants, September 29, 1964 (R. 625-626); and objections of G.E. (R. 669, see Pre-trial hearing, October 16, 1964, P.Tr. 6-10), and of Whirlpool (R. 642); and Order entered thereon (R. 671).

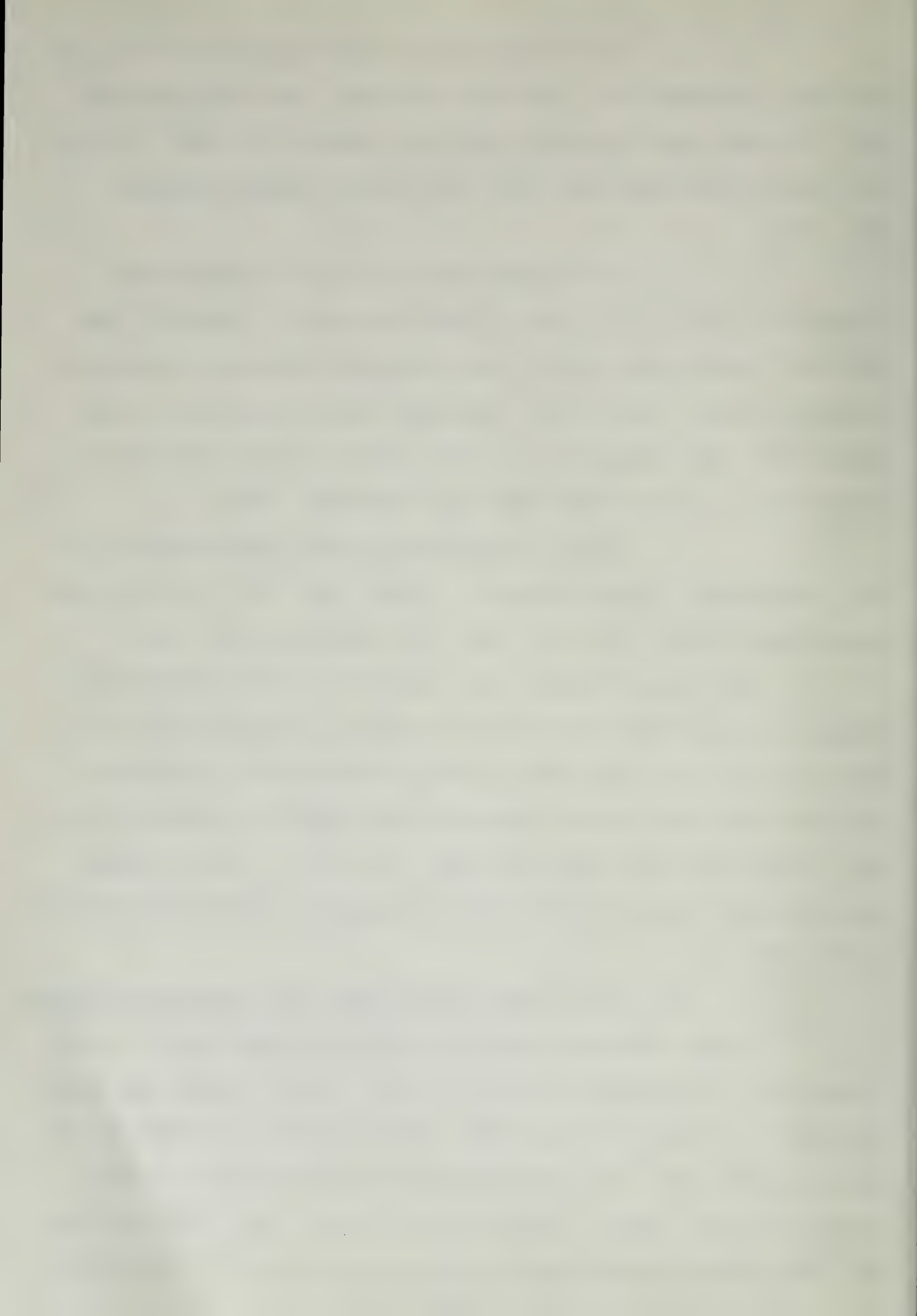
(3) Appellants' motion for production (Items 20, 22(c), (d), (e),) filed November 17, 1964 (R. 745, 749-750); objections of G.E. and Hotpoint (Pre-trial Hearings, December 30-31, 1964, P.Tr. 244-248; 255-259; 287-293); and orders (R. 1061 (Hotpoint) R. 1055, 1058 (G.E.)); Whirlpool objections to motion (R. 893); and order (R. 1017).

(4) Plaintiffs' Second Interrogatories to All Defendants, filed December 7, 1964, (R. 790, 791-792); and objections of G.E. (R. 797, 798), and Whirlpool (R. 809).

The Court ordered that answers to the Second Interrogatories would be limited to statements expressly referring to appellants, and not those having reference by implication or inference; and did not require defendants to identify attorney interviews with other parties. (R. 970). G.E.'s subsequent answers appear at R. 1237; Whirlpool's subsequent answers at R. 1050.

d. As to appellees Maytag and Maytag West Coast:

These companies did not object to appellants' interrogatories. See Maytag answers (R. 652, 657). These appellees objected to Item 15 of the June, 1964 motion for production of documents (R. 424, 425) on the ground they did not have any such documents: Maytag objections to motion (R. 559) and Order (R. 784); Maytag West Coast objections to motion (R. 554) and



Order (R. 787). These appellees responded the same way to Plaintiffs' Second Interrogatories (R. 1023, 1028); after objection (R. 84

Maytag and Maytag West Coast objected to the Items 20, 22(c), (d), (e) of Plaintiffs' Motion for the Production of Documents: as to Maytag (R. 745) and as to Maytag West Coast (R. 687). (Maytag objections (R. 851) and order thereon, denying only Items 22(d) and (e) (R. 1006); Maytag West Coast objections (R. 865) and order thereon (R. 1010).)

The pre-trial order of Judge Weigel, dated March 14, 1963 (R. 270), had expressly made available to all defendants the memoranda and notes prepared by representatives of plaintiffs for their attorneys.

E.

The Trial

The trial commenced September 3, 1965, and evidence was taken until November 8, 1965, at which time appellants rested their case and moved for the application of all evidence theretofore received against any single defendant or co-conspirator, against all defendants (Tr. 6604, 6605, 6608).

All the appellees jointly and separately then moved for a directed verdict and a dismissal of the case (Tr. 6609): Hale, R. 1782; Borg-Warner, R. 1794; R.C.A., R. 1807; Frigidaire, R. 1821; Whirlpool, R. 1865; G.E., R. 1883; California Electric, R. 1902; Maytag and Maytag West Coast, R. 1894.

Argument on the motions was heard on November 10, 1965 (Tr. 6632-6827). The jury was recalled on November 15, 1965 when various additional exhibits of appellants were placed

in evidence, and certain motions by appellees to strike evidence were granted (Tr. 6836-6902). Thereafter, the Court granted the motions of the defendants (Tr. 6916). In granting the motions, the Court prepared an opinion which he read to the jury (Tr. 6902-6918).

As to appellants' motion, the Court ruled that all documentary evidence offered against a defendant or co-conspirator would apply to all defendants, except Pl. Ex. No. 491, which was admitted against Frigidaire only (Tr. 6854). Testimony of certain conversations which were admitted into evidence against individual defendants, however, was not applied against all defendants: the testimony of Mr. Bert Green, witness for appellants, who testified concerning a telephone conversation (Tr. 5507-5515) was limited to appellee Borg-Warner (Tr. 6854). Conversations between Mr. Bernard Freeman, president of Manfree, and Mr. Muntain of appellee California Electric were admitted only as to California Electric (Tr. 6853-6855).

Thereafter, on November 26, 1965, judgment was entered against appellants entitled "Judgment on Directed Verdict and Order Dismissing Complaints" (R. 1977-1978). The Court also filed its Memorandum Opinion and Order granting motions for directed verdict (R. 1912-1976). Following the entry of judgment, a hearing upon bills of cost filed by appellees was held on November 30, 1965, and costs were assessed against the appellants in the sum of \$22,089.63 and made part of the judgment (R. 1978, 1979).



Rulings of the Trial Court
As to Appellants' Evidence, and Costs

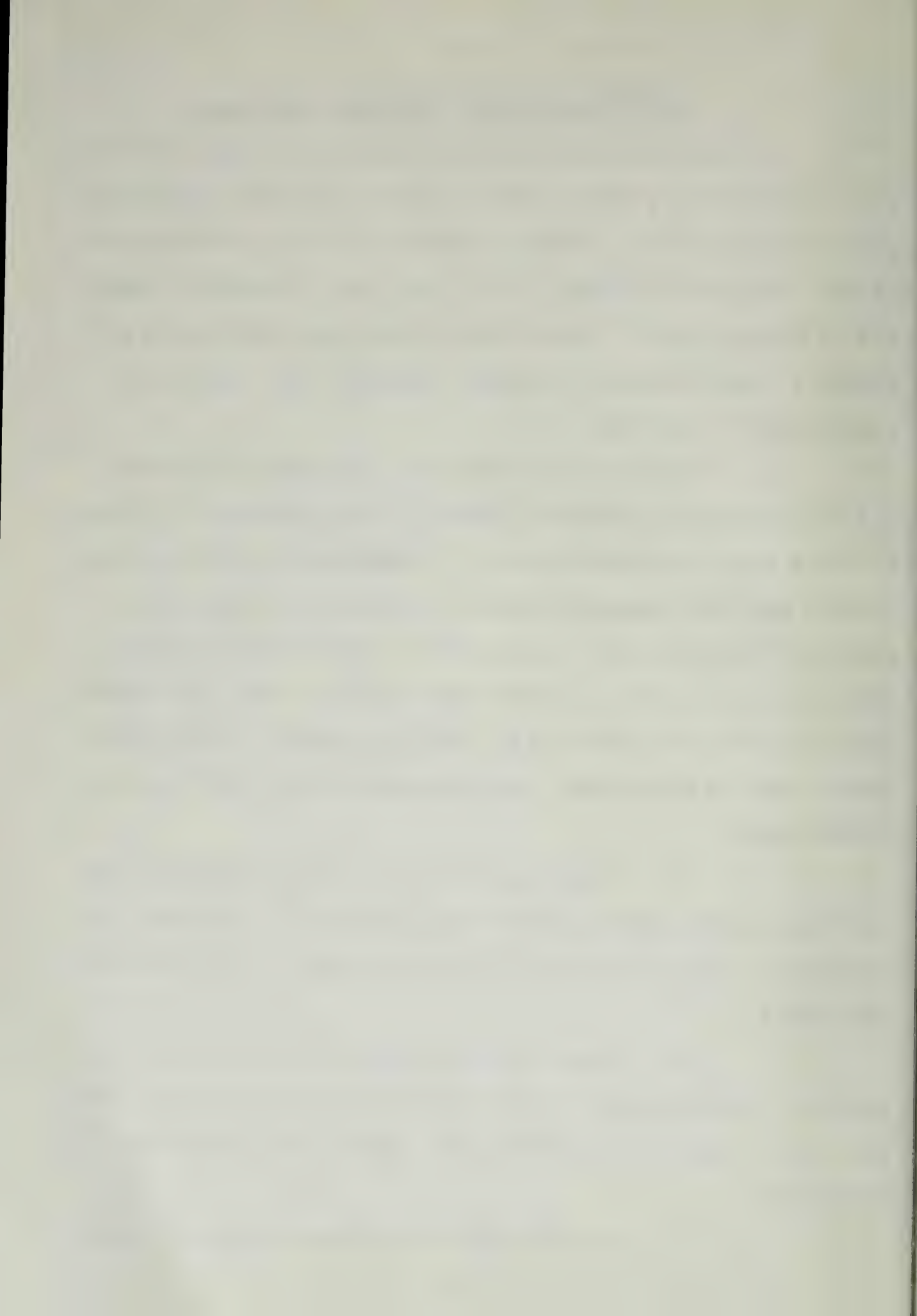
It is submitted that the record shows that the trial court erroneously ruled in many instances upon the inadmissibility of appellants' evidence offered, in its interpretation of the issues to be tried, in its pre-trial discovery orders, and in taxing costs. These errors have been detailed in appellants' Specification of Errors (Appendix A), and may be highlighted as follows:

1. The Court ruled that the corporate defendants and co-conspirators were not bound by the statement or actions of their sales representatives. It apparently held that such persons were not managing agents, or agents of sufficient authority to bind their principals by their words and deeds. However, the record is replete with evidence that such persons were clothed with authority by their principals to deal with stores such as appellants, take purchase orders, and discuss sales policy.

a. It was ruled that California Electric was not bound by the statements of its salesman, Mr. Muntain, as to matters within the scope of his authority. (Tr. 3932-3933, 3940-3941).

b. It was ruled that appellee R.C.A. was not bound by the statements of its field sales representative for the entire State of California, Mr. Gentile (Tr. 4645-4648, 4748-4750).

c. It ruled that Mr. Erickson and Mr. Carlson,

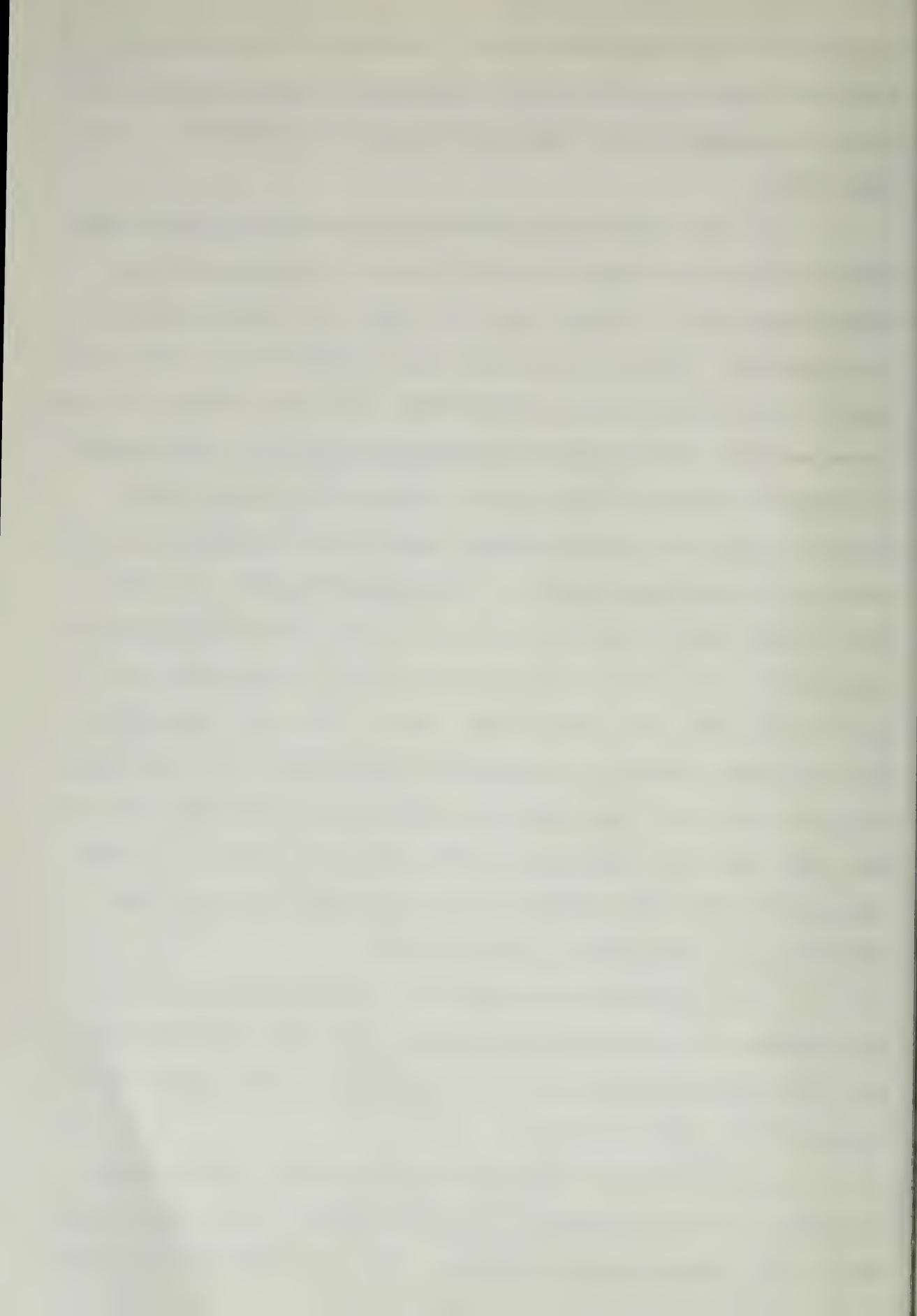


salesmen for co-conspirator Meyer, were not in positions of sufficient authority to permit evidence of their conversations with Mr. Freeman and Mr. Boyd of Manfree into evidence. (Tr. 4846, 4984).

2. It ruled that evidence of conversations between representatives of appellants and those of appellee and co-conspirator distributors, would not apply to the appellee or co-conspirator factory supplying those distributors with price lists, advertising funds, and product; despite evidence of complete exchange of information between factory and distributor, of repeated visits to such local vendors by factory representatives, and of correspondence dealing with local prices and policing of the local market. Memorandum Opinion, R. 1912, 1923, 1929, 1933. But see Pl. Ex. for Id. No. 431 (Appendix B herein); Pl. Ex. for Id. Nos. 343, 344 (Tr. 6497-6508); Pl. Ex. for Id. Nos. 348, 5060, 5061, 5068, 5070; Tr. 1210-1217; Tr. 2362-2368, 2389; Tr. 2590-2592; 2629a-2643; Tr. 2914-2916; Tr. 3090-3092; Tr. 3246-3252; Tr. 3588-3592, 3610-3612; Pl. Ex. Nos. 349, 350; Tr. 4965-4701, 4707-4708, 4716-4717; Tr. 4724-4727, 4728-4730, 4732-4735, 4738, 4744-4745; Tr. 4751; Tr. 4768-4769; Tr. 4860-4861; Tr. 5021-5028.

3. It refused to apply the express admissions of Mr. Valenson of California Electric, either to that appellee, or to any other appellee or co-conspirator. (See Specification of Error, No. V, A, 1).

4. It would not permit appellants to prove their attempts to obtain products from Los Angeles, while the boycott was in full force against Manfree. (See Specification of Error,



5. It refused to permit appellants to introduce evidence proving that co-conspirators Meyer and Hale worked together to investigate the sources of supply of R.C.A. products being sold by a discount store in the San Francisco Bay Area. It also precluded proof that Meyer and appellee R.C.A. worked together to prevent Spiegel Outlet Stores, a retailer who advertised R.C.A. at "cut prices" in San Francisco newspapers, from obtaining R.C.A. television sets, either locally or by transshipment. (See Specification of Error, Nos. V, I, 3; and V, D, 6.)

6. It refused appellants' offers to prove that Hale had the purpose and intent to control local retail competition in the products involved, by proof of Hale's earlier efforts to deprive a neighboring store on Mission Street, San Francisco, of the leading brands of such products. (See Specification of Error No. V, I, 21-22.)

7. It ruled that appellants could not introduce evidence to show that appellee G.E. had admitted that its local dealers did not engage in retail price competition; and that it had recognized, in intra-company correspondence, that franchising a discount store in the San Francisco area would seriously jeopardize its accounts with local large appliance and department stores. (See Specification of Error, No. V, C, 1.)

8. It refused to admit testimony that co-conspirators Graybar and Westinghouse were subjected to pressure from San Francisco dealers to prevent them from selling to discount stores, and were threatened with a loss of such retail accounts



if they did so. (See Specification of Error, Nos. V, C, 3-4; and V, I, 4.)

9. It rejected appellants' offer to show that appellee Maytag admitted that it had made a conscious change in its sales policy, when it cancelled Manfree's franchise, and refused to sell to appellant further. This ruling was made despite Maytag's defense that the inefficiency of Manfree's sales force was its reason for refusing to deal. (See Specification of Error No. V, G, 2.)

10. It refused to permit appellants to prove the contents of conversations between Mr. Alpine, U.S.E.'s president, and various representatives of the vendor appellees and co-conspirators, on the grounds that Mr. Alpine died before defendants were able to cross-examine him concerning memoranda prepared for his attorneys, concerning such conversations. (See Specification of Error No. V, H.)

11. It taxed items of costs improperly allowed to appellees under law. (See Specification of Error No. IX.)

G.

Questions Presented

1. Did the evidence presented by appellants, given the benefit of all inferences it fairly supports and viewed as a whole, allow reasonable men to conclude that a combination and conspiracy between appellees and co-conspirators existed, with the purpose and result of boycotting appellants, preventing them from purchasing and advertising major appliances and television sets?

2. Did each individual appellee participate in that



combination and conspiracy?

3. Did the Court commit prejudicial error in excluding evidence offered by appellants?

4. Did the rulings of the Court during trial, preventing appellants from calling former employees and officers of appellees as adverse party witnesses under F.R.C.P. Rule 43(b), or from calling such representatives of co-conspirators as unwilling or hostile witnesses under Rule 43(b), and limiting appellants' cross-examination of such witnesses, erroneously prejudice appellants?

5. Did the Court commit prejudicial error in ordering a separate verdict on the issue of liability, not permitting the case to be decided upon a single, overall verdict, and thereby precluding the introduction of any evidence of quantative injury to their businesses, by appellants ?

6. Did the Court commit prejudicial error in not allowing appellants to present evidence against appellees, based upon their entry into vertical conspiracies to maintain list prices on the subject products with other appellees and co-conspirators, to the injury of appellants?

7. Did the Court commit prejudicial error in dismissing appellee Norge Sales as a party?

8. Did the Court commit prejudicial error in refusing to apply evidence of statements and acts of certain of appellees' managing agents against them, and against other appellees, and in refusing to allow such declarations and admissions probative value?

9. Did the Court commit prejudicial error in denying



certain pre-trial discovery procedures, and thereby discovery of material evidence, to appellants?

10. Did the Court grant costs to appellees which were not properly taxable against the appellants?

H.

Statement of Facts

1. Major Appliances and Television Sets Were Advertised and Tagged at Factory List Prices by Defendant Retailers in San Francisco:

a. List prices on retail sales were established by the vendor defendants and followed by the defendant retailers:

The manufacturers of the subject products published price lists covering their respective models for distribution to the trade, with list (or retail) prices shown thereon; as demonstrated by the following evidence:

- (1) Frigidaire: Pl. Ex. Nos. 1903-1908;
- (2) G.E.: Pl. Ex. Nos. 1909-1916, 1937, and 4130;
- (3) Hotpoint: Pl. Ex. for Id. No. 5050;
- (4) Maytag: Pl. Ex. Nos. 1920, 5017;
- (5) R.C.A.: Pl. Ex. No. 1947;
- (6) Whirlpool: Pl. Ex. Nos. 1933, 1934, 1935 and 676;
- (7) Borg-Warner (Norge Sales): Pl. Ex. No. 1924;
- (8) Philco: Pl. Ex. Nos. 1899, 5020, 1943, 1944 and 5022; see also Pl. Ex. for Id. No. 5019.

The distributors prepared price sheets based upon these factory price sheets, for submittal to their retailers.

In San Francisco, most of the distributors adopted a policy of publishing "coded" price sheets, by which different retail dealers were granted different purchase prices. But despite the fact that the prices charged for the same model varied (dependent on the particular dealer's coded price sheet), all price sheets contained the identical list price. So-called "volume discounts" in dealer prices were in reality based upon the dealer's status with the supplier, and not upon the volume of orders given.

For evidence of this nature relating to distributors, see:

- (1) California Electric: Pl. Ex. Nos. 1899, 5022; 1926-1931; (see also Pl. Ex. Nos. 62A-F, 63, 65, and 66).
- (2) Lancaster: Pl. Ex. for Id. Nos. 1922, 1923.
- (3) Meyer: Pl. Ex. Nos. 1948, 1936.
- (4) Graybar: Pl. Ex. Nos. 1917, 1918, and 1938.
- (5) Maytag West Coast: Pl. Ex. Nos. 1921, and 4346.

These list prices were given to the retailers in price sheets disseminated by the distributors:

- (1) Hale-Meyer (R.C.A.-Victor): Pl. Ex. Nos. 1963 and 1948.
- (2) Hale-Meyer (Whirlpool): Pl. Ex. Nos. 1963 and 1956.
- (3) Hale-Calectron: Pl. Ex. No. 5073.
- (4) Hale-Maytag West Coast: Pl. Ex. Nos. 4346, and 4347.
- (5) Hale-G.E.: Pl. Ex. Nos. 1953 and 1954.

- (6) Hale-Frigidaire: Pl. Ex. Nos. 1952 and 1950; (see also 1903-1908).
- (7) Hale-California Electric: Pl. Ex. Nos. 1958, 1927, 1928, 1929, 1930, 1931, and 1949.
- (8) Hale-Lancaster: Pl. Ex. No. 1957.
- (9) Hale-Basford: Pl. Ex. Nos. 3051, 3052, and 1901.-
- (10) Hale-Sylvania: Pl. Ex. Nos. 334.
- (11) Hale-Westinghouse: Pl. Ex. No. 1955.

b. Retailers were required to advertise at factory list prices in order to receive co-operative advertising funds from defendant vendors:

Newspapers charge national firms, such as the manufacturers of the products involved in this case, much higher advertising rates than they do local retailers. (Pl. Ex. No. 4345). Thus manufacturers make available large advertising funds to selected retailers so that these local concerns will advertise their products in local newspapers and other local advertising media, taking advantage of the less expensive rates. These funds potentially can be used for such advertising under the authorization of the factory itself, or of its distributor, or by all retail dealers handling the products in a particular competitive (market) area like San Francisco. Such funds may also be used to sponsor and support the advertising of the factory's products under the listed name of the leading or "key" dealers in the market area.

The factory appellees and co-conspirators generally divided their advertising moneys into three types of funds

for use in the San Francisco market area: (i) regular "co-operative" advertising funds, (ii) "key market" advertising funds, and (iii) funds earmarked for specific retail accounts, called "Special Funds" or "Key Dealer Funds" (or other such special identification by letter or number). All advertising funds are made available by the factory directly, or through its distributor, to the retailers. In the case of the special funds, the money is earmarked specifically for the use of certain "key" retailers who enjoy special advertising rates. The evidence of this nature relating to the factory appellees and co-conspirators may be seen as follows:

- (1) Norge: Pl. Ex. Nos. 4089, 4350, 4357, 4359, 4098, 4099, 4101, and 644.
- (2) Philco: Pl. Ex. Nos. 655, 654, 656, 342, 1369, 1847-1898, 4349, 866, 70-73, 75, 77-79, 646, 647, 648, and 1740.
- (3) Maytag: Pl. Ex. Nos. 1059, 1034, 1035, 1081, 337, 772, and 773.
- (4) Frigidaire: Pl. Ex. Nos. 637, 937, 2081, 2058, 2060, 2061, 2064, 2068, 2070, 2059, 4297, 781, 921, 928, 933 and 934.
- (5) G.E.: Pl. Ex. Nos. 712, 713, 715, 714 and 717.
- (6) Hotpoint: Pl. Ex. Nos. 1094-1107, 28, 4384, 4385, 4386, 4387, 4390, 4388, and 4389.
- (7) R.C.A.: Pl. Ex. Nos. 99, 575, and 1846.
- (8) Whirlpool: Pl. Ex. Nos. 5081, 667, 5085, 5084, 4237, 665, 658, 686, 687 A-C, 688, 689, 4236,

From this evidence, it may be seen that regular co-operative advertising funds are generally earned by the retailer based on the total amount of its purchases over a given period of time. Key market advertising funds are specifically designated by the factory to promote its models in a certain metropolitan area. Special funds or key dealer funds are designated by the factory for the use of particular retailers.

Most of the advertising of the subject products conducted in San Francisco was placed by co-conspirator Hale and the other retail store co-conspirators, who received all three types of funds. (Id., and see Tr. 3162-3165).

Armed with extensive advertising funds, mostly provided by the factories, the local appellees and co-conspirator distributors enforced a price-advertising program which required the local retailer to advertise at list price. See, for instance:

(1) California Electric: Pl. Ex. No. 342; which reads, in relevant part (Ex. No. 342 C):

"Co-operative credit not approved under following circumstances:

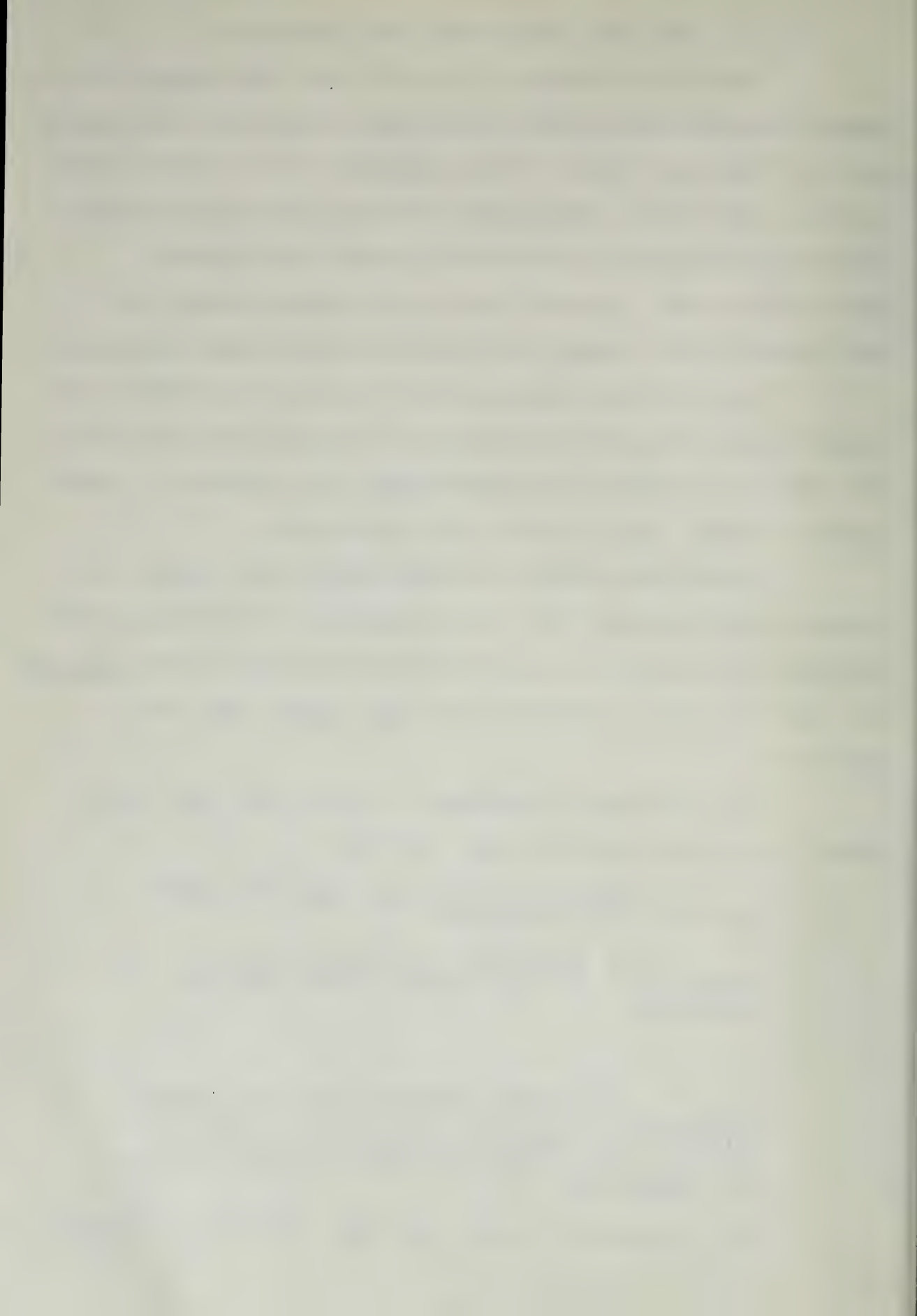
"It is understood and agreed that no application for cooperative credit will be approved . . .

* * * * *

"C. If prices are other than our current recommended prices or if ad offers a form of discount, or states an unauthorized specific allowance as a trade-in offer in either dollars or percentage . . ."

(2) Graybar: Pl. Ex. No. 339A, effective January 1,

1959:



"I. From time to time advertising monies will be made available to franchised Hotpoint dealers serviced by Central Pacific District of Graybar Electric Company, Incorporated.

"II. These advertising monies must be authorized in advance, in writing, on Graybar form SF 922. The form must be initialled by Graybar field representative and counter-signed by authorized Graybar management.

* * * * *

"IV. All advertising must conform to the following basic rules:

* * * * *

"D. No credits will be issued on advertising which is run below minimum recommended advertised price. A list of these prices is attached. This list will be amended from time to time as competitive situation warrants."

(3) Maytag West Coast: Pl. Ex. No. 337 reads, in relevant part, concerning Hale's advertising in "San Francisco Papers" in 1959:

" . . . Advertisement not to show list price or cut price, but will show only X number of dollars per week.

* * * * *

"4. The distributor will not pay for classified advertising; advertising containing unauthorized price reductions; advertising that is misleading or false in any way; newspaper advertisements containing fewer than four columnages; radio or television advertising consisting of fewer than 12 10-second announcements or the equivalent thereof."

(4) Lancaster: Pl. Ex. No. 4355 reads as follows, in relevant part:

"TO ALL DEALERS:

"In order to better serve you and your company and to expedite your cooperative advertising claims, please be advised that the following



processess (sic) will be in effect January 1, 1961 through December 31, 1961:

* * * * *

"5. To qualify for co-op participation, all ads must conform to Motorola, Norge, KitchenAid, Eureka and York Co-Op Policy . . .

* * * * *

"7. All newspaper ads must carry product illustrations and all advertising must be only on current models with suggested retail prices or monthly terms . . ."

(5) G.E.: Pl. Ex. Nos. 714, 717, and 708: Ex. No.

708 is a letter dated September 28, 1961, on G.E. stationery ("Major Appliance Division . . . General Electric Company, Northern California District") addressed to Mr. Carol Rogers of co-conspirator Hale, as follows:

"Dear Carol:

"Attached is the layout for your October Home Fair that we discussed the last time I was in to see you.

"We would recommend a price of \$259.95 on the WA850 washer and \$209.95 on the SP50V dishwasher. In so far as the LJ12 refrigerators are concerned, since you are the only dealer in the market who has any of these on hand, you are free to price this as you see fit. I would suggest you check with Mr. Thomas on this for his recommendation.

* * * * *

"Very truly yours,
"/s/ Tom Crossley
"T. A. Crossley
"Sales Training Specialist

"TAC
"Attachment"

(6) Frigidaire: Pl. Ex. No. 338 (Frigidaire's

"Cooperative Advertising Plan" for 1955-1957) reads as follows

n relevant part, under "general Provisions":

"4. The basis for determining the extent of such participation will be 1% of the suggested retail price at the end of each month, of eligible products billed to the Dealer, or a fixed amount established by the Factory on certain eligible products . . . but the amount of participation with any one dealer should not exceed 5% of the suggested retail price of eligible products billed to the Dealer . . . (pr. 1-2).

* * * * *

"Under no conditions should prices or price copy be changed from that originally contained in the printed material furnished by the Factory, either direct or through Frigidaire's advertising agency, for Factory-paid (national) advertising.

" Ads that may be run over the District's signature that mention price or prices must use the current factory suggested prices, and reference thereto in the advertising must follow precedent established in factory-paid (national) advertising ads; otherwise, the advertising will not be eligible for Co-op participation . . ." (pg. 6)

See, also, factory-established prices at pp. 24-25 of Ex. No. 338.

(7) Meyer: Pl. Ex. No. 1161 is a form of Meyer's co-operative advertising agreement made with all its retailers. This Exhibit reads, in relevant part:

" Dealer Co-operative Advertising Agreement

* * * * *

" Important regulations on reverse side-please comply. . .

" Participating Advertising - Reimbursement will not be allowed for advertising in which is featured other products competitive to the product being advertised. (On reverse side.)

" Price Cutting - Reimbursement will not be made for any advertising featuring a cut price." (On reverse side.)

Mr. Richard Sanford, as a former officer of co-conspirator Hale, testified as follows concerning the operation of the Meyer advertising program for retailers in the San Francisco market:

"(MR. SANFORD): We had to advertise in the newspaper at the suggested list or at no list at all in order to get any co-operative money from the Meyberg Company.

"Q. If you put a price at less than the distributor's suggested list you would not get any co-operative advertising, is that correct?

"A. That is correct." (Tr. 603).

See, also, Pl. Ex. No. 1956 (A-AF), Meyer price lists for Whirlpool appliances given to Hale, and containing "list prices" and "suggested list prices" (Tr. 615-625).

(8) See also Basford (Zenith brand): Pl. Ex. No. 3054.

c. The Retail price shown on the retailer defendants' price tags corresponded with the defendant factory or distributors' list prices:

The large advertising retailer thus also "tagged" (the price marked on the tag affixed to the individual unit on the floor of the store) the products involved here, at the list price. (Tr. 600-604; 1891-1892; 1743-1746; 2273-2274). The list prices of the factories and distributors allowed large margins; well over 30% (see the price sheets admitted in evidence, identified above).

The policy of appellant Manfree was to sell at a

retail price based on cost, plus 20%. This policy clearly was in conflict with Hale's admitted desire to maintain higher margins of 30% to 40% over costs, on identical or similar merchandise. (Pl. Ex. Nos. 349, 350, 5078; Tr. 270-271).

Pl. Ex. No. 4227, an intraoffice memoranda between personnel of appellee Whirlpool, shows the ability of the key dealers in San Francisco to demand and receive larger margins. The letter states, in pertinent part:

" . . . Dealers percentage will be an advertised list of \$289.95 to correspond with the larger margins requested in the San Francisco area by the accounts due to local situation."
(Tr. 5137)

2. Joint and Collaborative Relations Among Co-conspirator Hale and The Factory Defendants were Established By Substantial Evidence.

The manufacturers of major household appliances and television sets sought to make Hale, or the other retailer defendants, their major representatives in San Francisco.

Each factory defendant made special advertising funds available to insure that Hale advertised its product in the San Francisco newspapers. ^{1/} Hale, however, as the evidence shows, refused to advertise a factory's product, knowing the value of the Hale name in the local ad, as a means of applying pressure upon such manufacturer to insure its participation in the conspiracy to refuse to sell the subject products to

^{1/} See Pl. Ex. Nos. 646, 647. These transactions all occurred in 1957 and 1958, during the time Manfree was selling Philco brand major appliances (Pl. Ex. No. 1523). Hale refused to advertise Maytag products at all in 1958, during the period Manfree was able to obtain and sell Maytag major appliances. (Pl. Ex. No. 4153).

appellants. For this reason, Hale did not use the special advertising funds earmarked for it under Norg'e "Key Account" advertising program in 1957. (Pl. Ex. No. 644). This otherwise unexplained refusal of Hale to use such funds coincided with the period of time that appellant Manfree was selling Norge appliances, i.e., May, 1957 to October, 1957. (Pl. Ex. No. 1523).

Hale deducted large amounts of claimed credits for advertising expenditures from its checks sent to the Philco factory, which deductions were unauthorized by Philco because at the time Hale was not buying sufficient amounts of Philco products to warrant the deductions. (Pl. Ex. Nos. 646, 647, and 4349). Appellee California Electric (the Philco distributor in San Francisco) volunteered \$10,000.00 from its advertising funds to cover Hale advertising costs for Philco ads, after Philco had refused to allow Hale any further advertising funds. (Tr. 3735).

As concerns appellees Borg-Warner (Norge Division) or Norge Sales, advertising funds were made available for Hale and Macy's alone, under the Key Dealer or Key Account Funds (Tr. 2669-2674, 2682-2688, 2700, 5387-5391, 538-542, 2365-2368; Pl. Ex. Nos 4098, 643, 644, 4350, 4351, 4359, 4357, 4098 (B, G, H), 4099, 4101, 4102; see, also, Tr. 2412-2416). In 1959 and 1960 Hale received \$12,000.00 in advertising funds from Norge Sales (Id., and see Tr. 2695-2697). Norge Sales invited Hale's representatives to attend its special factory parties, open only to its "key accounts". (Pl. Ex. No. 4089).

As concerns appellee Hotpoint, it made special advertising funds available to its distributor, co-conspirator Graybar (Tr. 3219-3220, 3223-3248; Pl. Ex. Nos. 4384, 4385, 4386, 4387, 4390, 4388, 4389A-C). In turn, Hale received special Key City funds from Graybar for the advertising of Hotpoint appliances (Pl. Ex. Nos. 1094-1107; see Tr. 1420-1475). The Key City funds of Graybar-Hotpoint were not ordinary co-operative advertising funds (Tr. 3080-3088, 3093-3100, 3123-3124, 3229-3233). Macy's also received extensive advertising funds from Graybar to advertise Hotpoint appliances (Tr. 3162-3165; 3229-3233; Pl. Ex. for Id. No. 4364, Tr. 3258-3264.)

R.C.A. permitted its distributors a basic allowance to develop advertising funds, based on the volume of goods purchased (Pl. Ex. No. 99; see Tr. 4765). But in addition to these co-operative advertising fund allowances, R.C.A. supplied additional advertising funds for particular promotions (Tr. 4765-4766, 4792, 4797). Hale received a special authorization, No. 1001, in the amount of \$2,325.00, relating to R.C.A. Victor (Pl. Ex. No. 575). Hale received extensive advertising funds from co-conspirator Meyer for the newspaper advertising of R.C.A. television sets under Hale's name (Tr. 4857-4860; see, also, Pl. Ex. No. 1846).

Appellee Whirlpool developed a special advertising program for Hale (Tr. 576-577; 1249-1282; 1493-1500; 5068-5073; 5083-5108). Twelve thousand dollars was allowed for a special Hale's promotional program concerning Whirlpool products in 1959 (Pl. Ex. Nos. 689-C, 685A-C, 689A-B, 686A-E, 687A-C, 665, 4236,



4237).

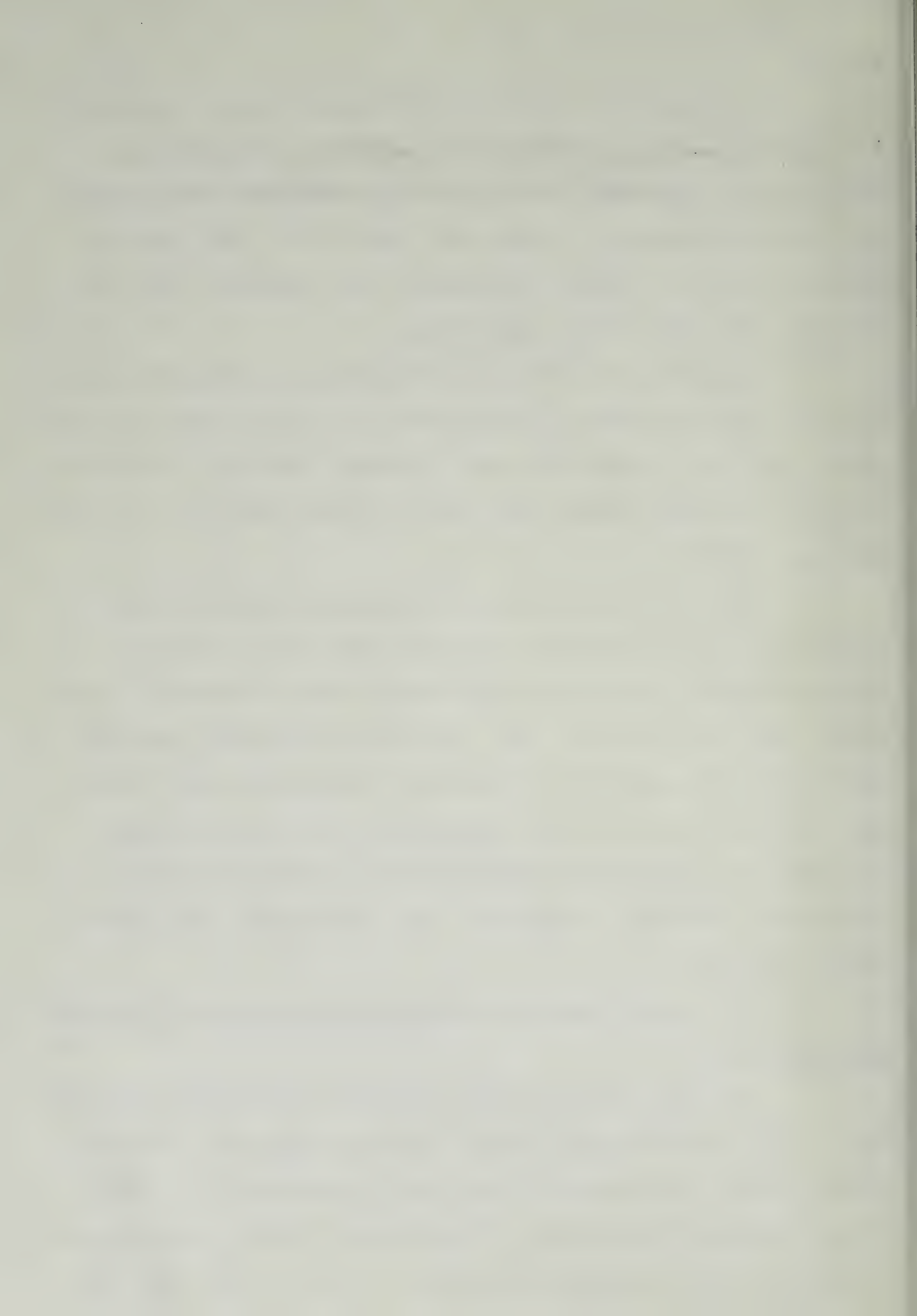
Appellee and co-conspirator manufacturers arranged for special meetings at their main offices, and elsewhere, between their officers and the officers of Hale (Borg-Warner, Tr. 521-523; Hotpoint, Pl. Ex. No. 638; R.C.A., Tr. 536-539, 222-224, 256-259, 574-575; Whirlpool, Tr. 260-280, 1493-1495, 576-579, 587, 1493-1495, 1501-1502).

Appellees Borg-Warner, Whirlpool, and Hotpoint manufactured special models of merchandise for their Key Accounts, which were sold to Hale (Tr. 446, 830-831, 835-836, 1506-1508; Pl. Ex. Nos. 1933, 1934, 1935; see Tr. 5127-5128, Pl. Ex. Nos. 4089 and 5078).

Each of the factories maintained regional representatives in the San Francisco area, and these regional representatives visited Hale and other retail accounts. (Borg-Warner (Mr. Gene Schick), Tr. 2914-2918; 2963-2964; Hotpoint (Mr. Orville Ransome), Tr. 4434-4436; 4445, 4458-4460; R.C.A. (Mr. Dan Gentile, Mr. Wade Brightbill), Pl. Ex. No. 4344, Tr. 4695-4701; 4768-4769; Whirlpool (Mr. James Walker), Tr. 5031-5034; 5041-5046; Frigidaire (Mr. John Shaw), Tr. 4292-4297; 4302-4307).

3. Direct Relations Between the Distributor Defendants and Hale.

Hale was co-conspirator Philco's "Associate Distributor" in the San Francisco area. Appellee California Electric, as the Philco distributor in the area, supervised the allocation of special advertising or promotional authorizations given to Hale as the Associate Distributor. (See Pl. Ex. Nos. 295-



299, 655, 654, 656, 70, 71, 72, 75, 77, 78, 79, 1369, 4349, 4363, 1790, 1847-1898, 866A, 866B; also see Tr. 851-852, 1087-1096).

G.E. allowed Hale 100% paid advertising, and offered it special "closeouts" of certain model numbers. (Tr. 805-806; see Pl. Ex. Nos. 708, 712, 713, 715, and 717).

Frigidaire allowed Hale special funds and "Key City" funds for advertising purposes. (Tr. 746-777, 780-781, 794, 4020-4023, 4256-4259; Pl. Ex. Nos. 937, 4297, 781, 697, 698, 699, 2058, 2060, 2061, 2064, 2068, 2070, and 2059).

Maytag West Coast allowed Hale special advertising funds. (Tr. 3343-3346; Pl. Ex. Nos. 1081, 1059-B, 1061-1062, 1034, 1035, 4054, 772, and 773).

4. Appellees Refused to Deal with Appellant Manfree, and Prevented Appellant United Shoppers Exclusive from Advertising in the Morning Newspapers in San Francisco.

a. Appellant Manfree's leading brands were cancelled:

The evidence is undisputed that the factory appellees, or their Northern California distributors, refused to sell major appliances and television sets to appellant Manfree, and that appellant U.S.E. was unable to advertise at all in the two morning San Francisco newspapers, The San Francisco Examiner and The San Francisco Chronicle. This evidence may be summarized as follows:

When Manfree opened in May, 1957, it was retailing

major appliances manufactured by Philco,^{8/} (subject to certain specific limitations concerning advertising these products at a price below the "list price"), Maytag, Hotpoint, and Borg-Warner (Pl. Ex. No. 1523). Manfree was also selling television sets manufactured by Hotpoint, co-conspirator Sylvania, and by Admiral, Emerson and Olympic. It was also selling Admiral brand major appliances, Gaffers & Sattler ranges, Easy appliances, and appliances manufactured by co-conspirator Zenith. (Tr. 5711-5715; 5640-5642).

Mr. Bernard Freeman, president of Manfree, had previously been in the retail furniture business in San Francisco, through a company called "Barnal". Because of his contacts with local suppliers, he obtained the Philco line from California Electric, the Hotpoint line from Graybar, the Norge line from Lancaster, the Sylvania line from co-conspirator Frank H. Edwards Co., and the Admiral line from Admiral (Tr. 5706-5715).

Manfree came into existence after the prior U.S.E. concessionaire for the major appliance and television lines, United Sales, went into an informal creditors' arrangement. (Tr. 5708, 5712). United Sales had been selling the Norge and Philco lines. (Tr. 5711-5712).

Manfree was specifically requested by California

^{8/} With respect to Philco products, Manfree was able to buy only major appliances for resale from California Electric, and was never able to acquire Philco television sets from that appellee for demonstration purposes on its floor. Philco television sets could only be purchased at Manfree through the expedient of the salesman showing a Philco catalogue to the customer, or the customer requesting a specific Philco model. (Tr. 5755-5758).

Electric not to advertise prices of Philco appliances in the afternoon San Francisco newspaper (Tr. 5725). Appellee Maytag also advised Mr. Freeman not to advertise prices of Maytag appliances (see appellants' offer of proof, Tr. 5783-5784).

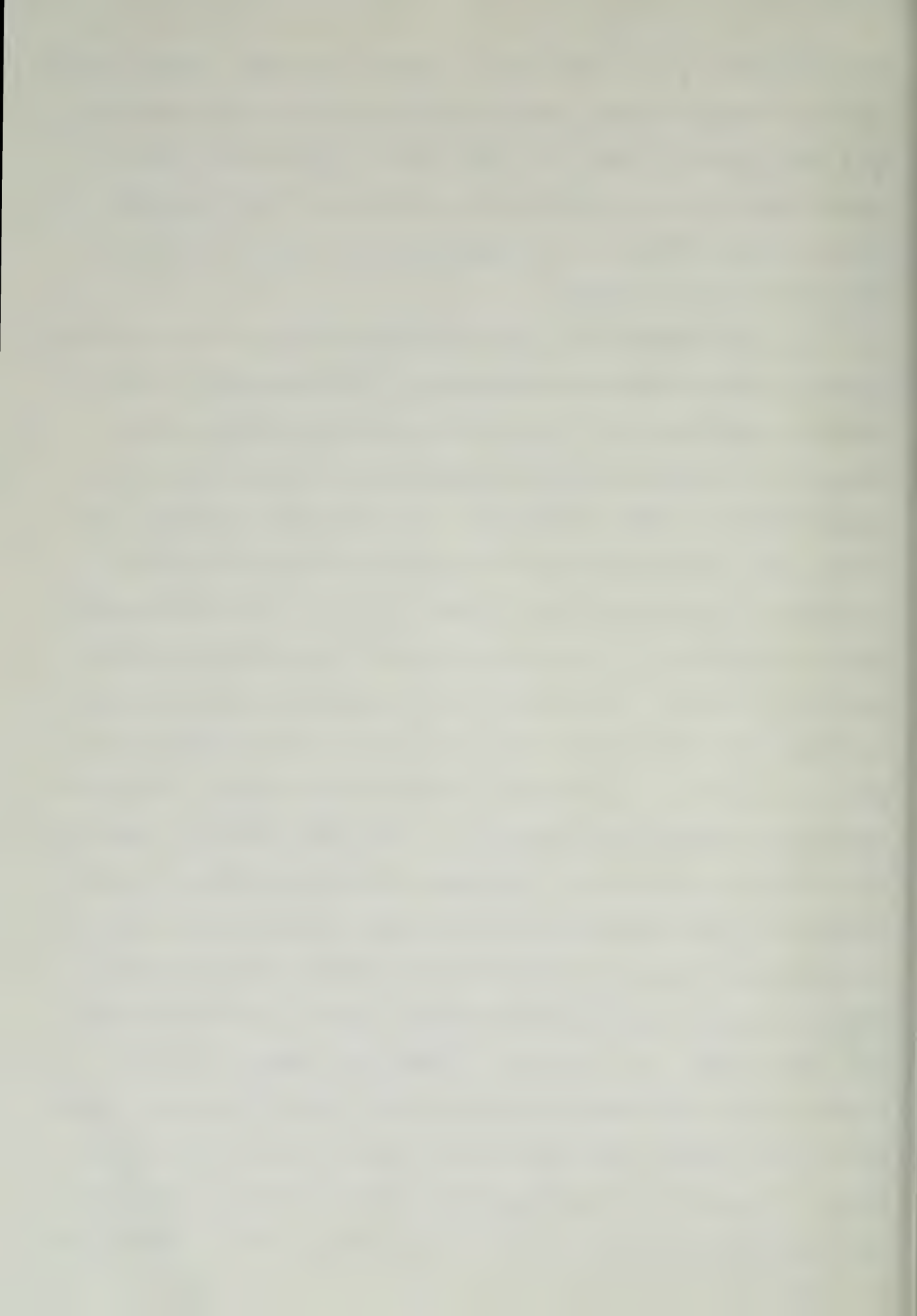
Manfree lost the Norge line in October, 1957, and although it consistently thereafter requested to be able to repurchase Norge appliances, it was never able to obtain them. California Electric cancelled Manfree's purchases of Philco major appliances in September, 1958. The Hotpoint line was cancelled in October, 1958. Maytag cancelled Manfree as a dealer in March, 1959. The direct and undisputed evidence as to these cancellations is as follows (see compilation in Pl. Ex. No. 1523):

(i) Cancellation of the Norge line: At the time the Norge line was cancelled in October, 1957, Mr. Mitchell, of co-conspirator Lancaster, told Mr. Freeman that Lancaster had been subjected to pressure from Hale not to sell to Manfree, and had been advised by Hale that unless it ceased selling to appellant, Hale would not buy such products from Lancaster. He stated that the Lancaster organization held a meeting to consider the situation, where it was decided that under such circumstances Lancaster would not sell to Manfree any longer. (Tr. 5808-5809)

(ii) Cancellation of Philco appliances: Mr. Freeman was told by Mr. John Muntain, salesman for appellee California Electric, in September or October, 1958, that California Electric would not sell Philco major appliances to Manfree because of pressure from other retail stores in

San Francisco. (Tr. 5735-5737). After September, 1958, Manfree could not obtain either Philco major appliances or television sets (Pl. Ex. No. 1523; Tr. 5738-5749). California Electric ceased selling major appliances to Manfree, after appellant had advertised Philco major appliances in its advertising "mailers" in March, 1958.

Mr. Freeman was told that Manfree or U.S.E. could not advertise Philco brand merchandise in the newspapers, that appellants would have to "go slow" on sales of Philco goods because of pressure upon this appellee distributor from their other accounts. (Tr. 5721-5726). Mr. Freeman, however, prevailed upon California Electric to permit Manfree to show a picture of Philco major appliances in their "First Anniversary" advertising mailer. This was agreed to, on condition that a picture of Philco's television not be shown in the afternoon San Francisco newspaper. Thus, Pl. Ex. No. 1827-16 shows a picture of a Philco television in Manfree's mailer, but not in the San Francisco Call Bulletin (Pl. Ex. No. 1827-16, compared to Pl. Ex. No. 1827-17). Following this advertising, in the First Anniversary mailer in March, 1958, however, Mr. Muntain of California Electric called on Mr. Freeman at appellant's office and said that he would have to "pull" the Philco line (Tr. 5726-5734). In September, 1958, Mr. Muntain told Mr. Freeman that his company would not sell Philco major appliances to Manfree because of pressure from other stores. (Tr. 5735-5737). (Manfree had purchased \$47,500.00 of Philco appliances from California Electric prior to September, 1958. See Pl. Ex. No. 1523).



(iii) Cancellation of the Hotpoint Line: Co-

conspirator Graybar formally cancelled Manfree's franchise as a Hotpoint dealer by letter dated October 28, 1958. Prior to this date, Manfree had purchased \$100,000.00 of Hotpoint major appliances and television sets. (See Pl. Ex. No. 1523). The letter from Graybar to Manfree states as follows (Pl. Ex. No. 525; Tr. 3071-3072):

"MR. B. FREEMAN
"Manfree, Inc.
"2850 Alemany Blvd.
"San Francisco, Calif.

"Dear Sir:

"Please be advised that it has become necessary for us to invoke Paragraph 8 of the Servicing Dealer Franchise dated January 6, 1958 between your company and Graybar Electric Company, Inc., relating to Hotpoint. Pursuant thereto, this letter herewith serves as notice that Graybar Electric Company, Inc., elects to and hereby does terminate said Servicing Dealer Franchise in its entirety.

"This action is being taken after full consideration of our past relationship. Should there be an opportunity for renewing a sales arrangement with you at some later date, we will value the privilege of discussing the matter with you at that time.

"Very truly yours,

"GRAYBAR ELECTRIC CO., INC.

"/s/ G. L. Call
"District Manager"

When Mr. Freeman requested an explanation for this conduct, he was told by Mr. W. H. Mayben, District Appliance Sales Manager for Graybar (Tr. 3043), that Graybar would not be able to sell to department stores or other stores as long as it was selling to discount stores (Tr. 5797-5798). Graybar

gave official notice of the cancellation of appellant's franchise to Hotpoint, as required by appellee Hotpoint in its distribution agreements (Pl.Ex. Nos. 536A, 536C).

(iv) Cancellation of the Maytag Line: Manfree also received a formal written cancellation of its franchise as a Maytag dealer from appellee Maytag West Coast. Manfree had sent Maytag West Coast an order for 25 Maytag Washers on April 25, 1959 (Pl. Ex. No. 4164-E). Maytag's letter answer to this request, dated April 30, 1959, was as follows (Pl. Ex. No. 567, Tr. 3330-3331):

"Manfree, Inc.
"2850 Alemany Avenue
• "San Francisco, California

"Gentlemen:

"Our Oakland office has just forwarded an order to us from United Shoppers Exclusive for 25 Maytag automatic washers, Model 142B. I am not familiar with this company and they do not have a Maytag franchise; consequently we are not able to honor their request by filling this order.

"In addition, and for your information, the Maytag 1958 franchise for Manfree, Inc., expired as of March 31, 1959, and as John Mitchel, our Regional Manager explained to your company previous to this expiration date no franchise would be written for your company for the year 1959.

"Sincerely,

"MAYTAG WEST COAST COMPANY

"/s/ R. V. Hahn
"R. V. Hahn
"President"

The uncontradicted evidence shows that Hale was not purchasing Maytag appliances in 1958 (Pl. Ex. Nos. 1524 and 1525). Just prior to the letter of cancellation from Maytag

to Manfree dated April 30, 1959, Hale ordered a carload of Maytag appliances in the approximate sum of \$11,000.00 (Pl. Ex. Nos. 639 and 640). Hale, who did not handle the Maytag line in 1958, thereafter became a leading purchaser of Maytag appliances (Pl. Ex. No. 641, 4161). Hale also became a major advertiser of Maytag appliances after 1958 (Pl. Ex. No. 4153). It received an advertising allowance constituting more than one-third of the purchase order of March, 1958, allowing it to advertise extensively as a Maytag dealer (Pl. Ex. No. 4153; Tr. 1120-1122).

b. Oral requests by representatives of
Manfree for leading brands, during the
period 1957 to 1960:

Repeated oral requests to vendors were made by Mr. Bernard Freeman and Mr. Arthur Alpine (president of U.S.E. and vice-president of Manfree), for the leading brands of major appliances and television sets for Manfree, without success:

Mr. Freeman had requested permission to purchase Philco television sets from California Electric. However, Manfree could not obtain these television sets as a "regular" dealer (supra, at footnote 8; Tr. 5755-5758).

Mr. Alpine and Mr. Freeman contacted Mr. Bernard Meseth of appellee G.E. in November, 1958, concerning the purchase of G.E. appliances by Manfree. They arranged for a luncheon appointment with him. At the conference, Mr. Alpine requested that Manfree be sold five carloads of G.E. appliances and television sets. Mr. Meseth told Messrs. Alpine and Freeman that he doubted if he could authorize a sale to Manfree

because of "present dealer structureship." This request was reported by Mr. Meseth to higher authority and the demand for five carloads was denied. (Tr. 5837-5843; 5218-5223).

Mr. Freeman attempted to obtain Westinghouse products in 1958 or 1959 from Mr. Bert Newby, Sales Manager, Westinghouse (Tr. 5911). A luncheon meeting was held between Freeman, Alpine and Newby, at which time Mr. Newby stated to Mr. Alpine that Manfree would have to purchase a "million dollars worth of appliances" from Westinghouse a year, since Westinghouse would lose that much business if it sold appliances to Manfree. (Tr. 5915-5920).

. Mr. Freeman requested the right to purchase the Zenith television line in 1957, from co-conspirator Basford, but the request was refused with the statement of Basford's sales representative, Mr. Bill Hayward, to Freeman that the line was fair traded, and because of that, it could not be sold to Manfree. (Tr. 5907-5910).

In 1959 or 1960, Mr. Freeman approached the salesman for co-conspirator Lancaster, Mr. Al Schmidt, who was selling Motorola radios for his firm to the U.S.E. radio concessionaire, Camrose, Inc. Mr. Freeman requested the right to purchase the Motorola television line. Mr. Schmidt said he would let Mr. Freeman know, and he reported back later to Freeman that he "couldn't do anything about it". (Tr. 5886-5888).

In either June or July, 1960, Mr. Freeman personally asked the Meyer salesmen representing the Whirlpool and RCA Victor radio lines, Mr. Carlson and Mr. Brown, whether Manfree could not carry these major appliance lines, pointing out

to them in support of the request what an excellent job "Camrose was doing on RCA radios." This request was turned down. (Tr. 5892-5894). The Meyer salesman stated to Mr. Freeman that because of dealer structureship, they were unable to sell RCA televisions to Manfree (Id.).

Representatives of appellee Frigidaire had visited Manfree in 1957 and were asked for a franchise. Frigidaire would not sell its products to Manfree, however. (Pl. Ex. No. 487; Tr. 5825-5829).

c. Appellants attempted to obtain Norge brand major appliances in 1959 from sources in Los Angeles or Chicago, and were unsuccessful:

Mr. Bert Green, the brother-in-law of Mr. Arthur Alpine, was in the business of retailing major appliances in Los Angeles, and testified in this case as a witness for appellants. In 1959, his firm was selling Norge appliances (Tr. 5459-5461).

Mr. Alpine contacted Mr. Green and asked if it would be possible for him to obtain leading-brand major appliances for appellant Manfree through his business contacts in Los Angeles. In this connection, on January 1, 1959, he formally appointed Mr. Green as an agent to purchase major appliances and television sets for Manfree (Pl. Ex. No. 5105).

Mr. Green then contacted representatives of co-conspirator Graybar, distributor for Norge appliances in Southern California (Tr. 2389; 5369-5373). The Division Manager for Graybar at that time was Mr. Ed Bonnet; the Appliance Sales

Manager was Mr. Dale Ash (Pl. Ex. No. 4023; Tr. 5380-5381; 5474-5475); and the salesman who called upon Mr. Green was Mr. Milt Jenkins. (Tr. 5470-5474). Mr. Green placed a carload purchase order with Mr. Jenkins for Norge appliances to be shipped to San Francisco. Mr. Jenkins told Mr. Green that he would have to get approval of the order, and it was thereafter accepted. (Tr. 5470-5474; 5521-5523). The carload subsequently arrived in San Francisco; whereupon a representative of co-conspirator Lancaster in San Francisco called Graybar in Los Angeles to protest the shipment. Mr. Bonnet related this to Mr. Green (Tr. 5512-5513). In April, 1959, a second order for six refrigerators placed by Mr. Green for appellants was honored by Graybar, Los Angeles, and sent to appellant U.S.E. in San Francisco, but this was the last such order that Graybar would honor. (Tr. 5476-5477; 5515-5519).

After Mr. Green was told that he could no longer obtain Norge appliances from Graybar, he requested that appellee Norge Sales in Chicago, Illinois, honor his purchase orders. The written reply to this request, dated May 18, 1959, is contained in Pl.Ex. No. 4035.

Thereafter a meeting was held at the offices of Graybar in Los Angeles in June of 1959, attended by Mr. Green, Mr. Bonnet, and Mr. Ash. At this meeting Mr. Green asked Mr. Bonnet and Mr. Ash why Graybar would not accept the large orders he had sent them on behalf of appellants. Mr. Bonnet stated "I cannot do it." Mr. Green asked him why. Mr. Bonnet stated that Lancaster won't allow it. (Tr. 5508). Mr. Green then requested Mr. Bonnet to call Lancaster's offices in

San Francisco and ask them why Graybar could not sell Norge appliances to appellants. (Tr. 5508). Mr. Bonnet went to another room, called San Francisco, came back and reported the substance of the conversation to Mr. Green, to the effect that Lancaster didn't care whether Graybar, Los Angeles, sold merchandise to Green for U.S.E., but that Lancaster did not want to sell to U.S.E., because it did not want to jeopardize a million dollar business with Broadway-Hale. (Tr. 5509). Mr. Green again requested that Graybar honor his carload purchase orders for appellants, but the request was denied, Mr. Bonnet saying to Mr. Green, "I will let you know next week". (Tr. 5510).

After this meeting, Mr. Green wrote another letter to appellee Norge Sales in Chicago, Illinois, dated June 16, 1959, requesting that his orders for Norge appliances submitted on behalf of appellants be accepted. (Pl. Ex. No. 4034). Norge Sales replied, through Mr. H. P. Bull, that the merchandise requested was "out of stock". (Pl. Ex. No. 4037).

The evidence further showed that after the first transshipment of a carload of Norge appliances through Mr. Green to U.S.E., Lancaster immediately protested to appellee Norge Sales. Mr. Harold P. Bull, Norge Sales vice-president, then called a meeting between the representatives of Lancaster, Graybar, and himself, at the Villa Hotel in San Mateo, California. (Tr. 5369-5382; Pl. Ex. Nos. 4011, 4014, 4023, 4029, and 4019).

Prior to this meeting, Mr. Bull, acting on behalf of Norge Sales, imposed a fine upon Graybar, Los Angeles, for

transshipping the merchandise. (Tr. 5380-5382; 2977-2989; Pl. Ex. Nos. 4011, 4014).

At the meeting at the Villa Hotel, Mr. Gilbert Freeman, Sales Manager of Lancaster, told Mr. Bonnet that he didn't like Graybar shipping Norge products into Lancaster territory. He demanded that Mr. Bonnet stop the transshipments. (Tr. 2592).

Therefore, by April, 1959, Manfree was unable to obtain any of the leading brands of television sets, and virtually none of the leading brands of major household appliances. This situation was never altered during the entire period of time covered by the two complaints.

d. The morning newspapers in San Francisco refused to accept advertising from U.S.E.:

U.S.E.'s vice-president, Mr. Joseph Mittelman, also was advertising representative of the San Francisco Call Bulletin, the afternoon newspaper published during the period of time involved. (Tr. 2030-2035). During the period 1957 to 1960, he had repeatedly attempted to place U.S.E. advertising in the San Francisco Chronicle, through requests to the Chronicle from the management of the advertising department at the Call Bulletin (Tr. 2056-2062). When these steps were unsuccessful, he then made requests for advertising himself directly to representatives of the Chronicle and Examiner. (Tr. 2062-2092). The advertising copy submitted to the Examiner upon various occasions, but never run by that newspaper, and related correspondence, was admitted against all defendants (Pl. Ex. Nos. 1275A, 1273A, 1274A, 1275B, 1272, 1271; see Tr. 2072-2080).

Pl. Ex. No. 4257 is a copy of an ad requested to be

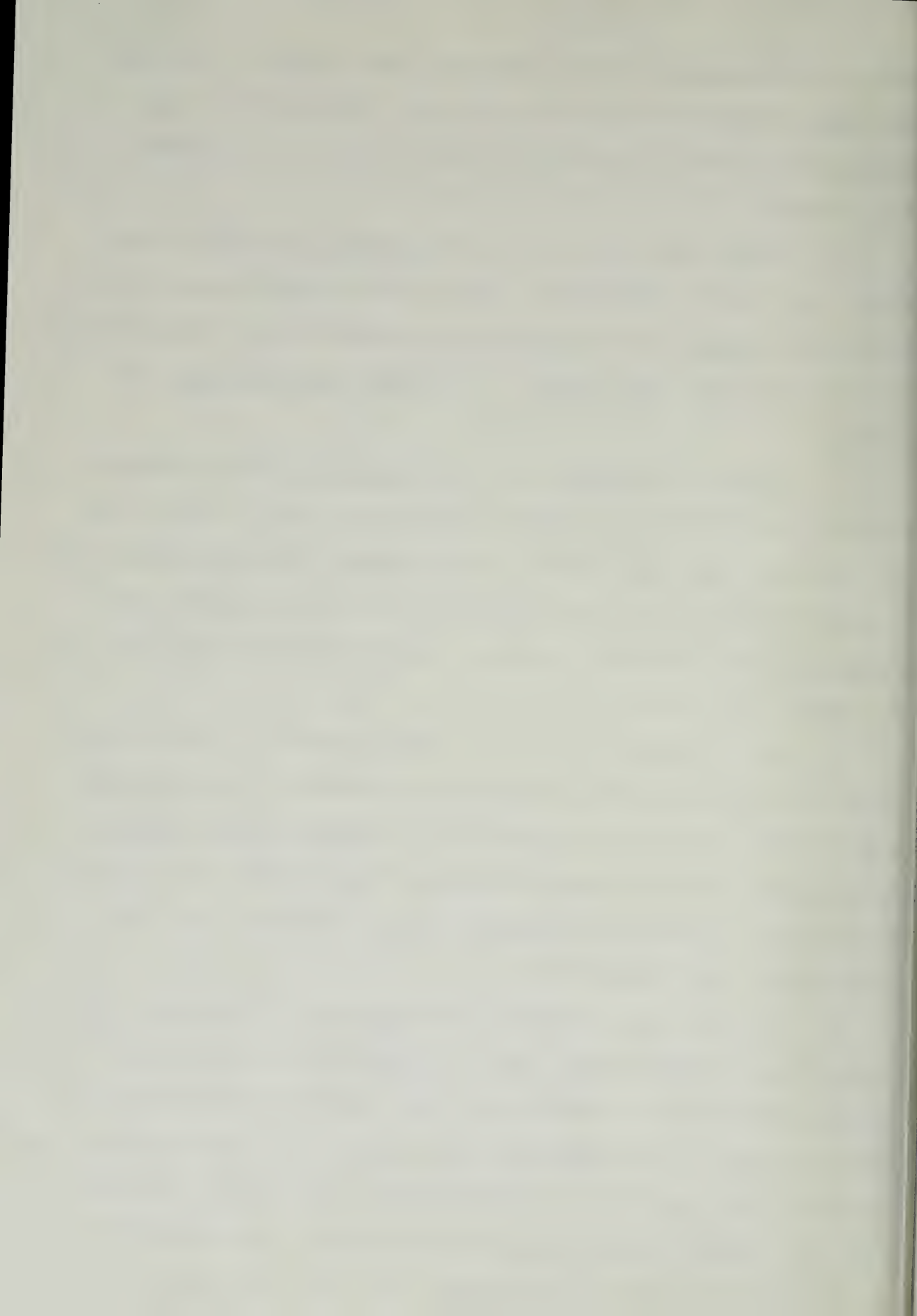
run in the Examiner and the Chronicle for October, 1958; the Examiner refused to accept the copy (Tr. 2067-2071). The Chronicle refused to run the ad shown in Pl. Ex. No. 1278A (Tr. 2083).

These ads were run by the News Call Bulletin, however. (Tr. 2069; 2083-2084). Thus, the evidence showed that both the Examiner and the Chronicle refused to run the advertising copy that had been placed in the News Call Bulletin for U.S.E.

Both the Examiner and the Chronicle later refused to accept U.S.E.'s ad for a sale scheduled for July 4, 1960 (see Pl. Ex. Nos. 1272 and 1277A). This request for advertising was rejected in writing by the Examiner (Pl. Ex. No. 1272); the Chronicle also refused to accept the advertisement (see Pl. Ex. No. 1277A; Tr. 2090).

Mr. Mittelman also testified concerning his conversations with Mr. Ward, the advertising manager of the Chronicle, and with Mr. Gamble, the advertising manager of the Examiner. He requested, through these officers, that U.S.E. advertising be accepted in these newspapers, but his attempts were all unsuccessful (Tr. 2098-2105).

In the fall of 1960, the Examiner's classified advertising representative, Mr. Aro, called on Mr. Mittelman to request that U.S.E. advertise in the classified ad section of that newspaper. Mr. Mittelman said that U.S.E. would be willing to do so, but that Mr. Aro should check into the entire situation concerning U.S.E.'s inability to obtain the usual retail store advertising in the Examiner. Mr. Aro later reported to



Mr. Mittelman that the Examiner could not accept U.S.E. advertising, because of pressure exerted upon the newspaper from the big downtown retail stores such as Hale, Macy's, The Emporium, and Roos/Atkins (Tr. 2105-2123). A memorandum was prepared at the time of the conversation by Mr. Mittelman and placed in evidence as appellee Borg-Warner's Exhibit No. 9024 (Tr. 2164). The Court subsequently struck the exhibit from evidence, as well as Mr. Mittelman's testimony regarding the exhibit (Tr. 6786-6789).

- e. The written request of appellants for major appliances and television sets was rejected by appellees and others:

In June and July, 1960, Manfree sent written demands to the vendor appellees and co-conspirators who manufactured or distributed the subject products, that appellant be permitted to purchase such products for resale. The boycott against appellants by these companies was in full force, as Manfree was then completely unable to obtain the leading brands of major appliances and television sets. (See Pl. Ex. Nos. 4280 and 568 (Maytag); 1801, 1803, 1804 (Philco); 3049 (Sylvania); 491 and 492A (Frigidaire); 509 and 510 (G.E.); 1710 (Whirlpool); 4286 (Norge); 537 (Hotpoint); 1759 (Motorola); 1783 (California Electric); 1703 and 1704 (Meyer); 1754, 1756 and 4284 (Lancaster); and 526 (Graybar)). These appellee and co-conspirator vendors continued to refuse to deal with Manfree. The evidence as to these common, continued refusals is summarized as follows:

- (1) Norge Appliances and Motorola
Television Sets:

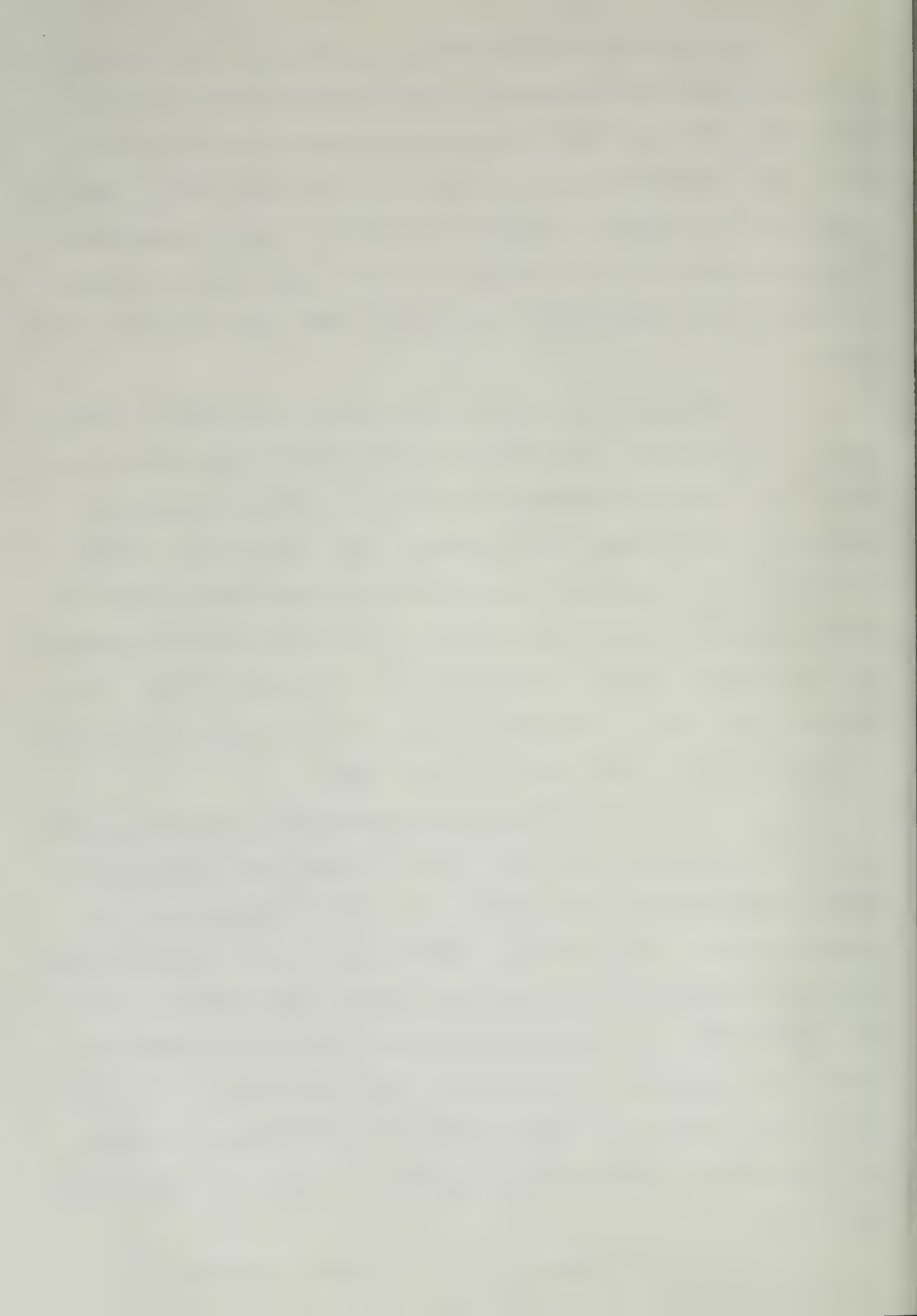
The letter of Mr. Alpine (Pl. Ex. No. 4286) to appellee Norge Sales was referred to co-conspirator Lancaster by Norge (Pl. Ex. No. 556). This letter contained the personal notes of a representative of Lancaster, stating "Jack - see me - imp" (Tr. 2615-2621). Lancaster refused to send a representative to Manfree, or to otherwise discuss appellant's request. (Tr. 2613-2615; see Pl. Ex. Nos. 1754, 4284, and 1756; Tr. 2613-2615).

Although co-conspirator Motorola referred Mr. Alpine's letter to Lancaster, its local distributor (Pl. Ex. for Id. No. 1760), Mr. Gilbert Freeman of Lancaster could not recollect discussing the request with anyone. (Tr. 2848-2853). This testimony, however, must be considered in conjunction with the fact that the letter from Motorola to Manfree advising appellant of the referral shows a carbon copy was directed to Mr. Gilbert Freeman (Tr. 2851). Lancaster never would sell Motorola brand television sets to Manfree (Tr. 2866-2867).

(2) Philco Appliances and Television Sets:

Appellee California Electric sent its "Key Account" sales representative, Mr. Weaver, to call on Manfree in the summer of 1960. He stated to representatives of appellant that California Electric would not sell Philco appliances to Manfree (Tr. 5778-5779). Mr. Weaver testified that he was shown the letter from appellant requesting Philco appliances (Pl. Ex. No. 1783) by Mr. Valenson, Sales Manager of California Electric, and that he was told to call on appellant by Mr. Valenson (Tr. 3915-3917).

California Electric did not invite Manfree



representatives to its trade show in the spring of 1960, although they were asked to attend an earlier trade show held by appellee in 1958 or 1959 (Tr. 3960-3966).

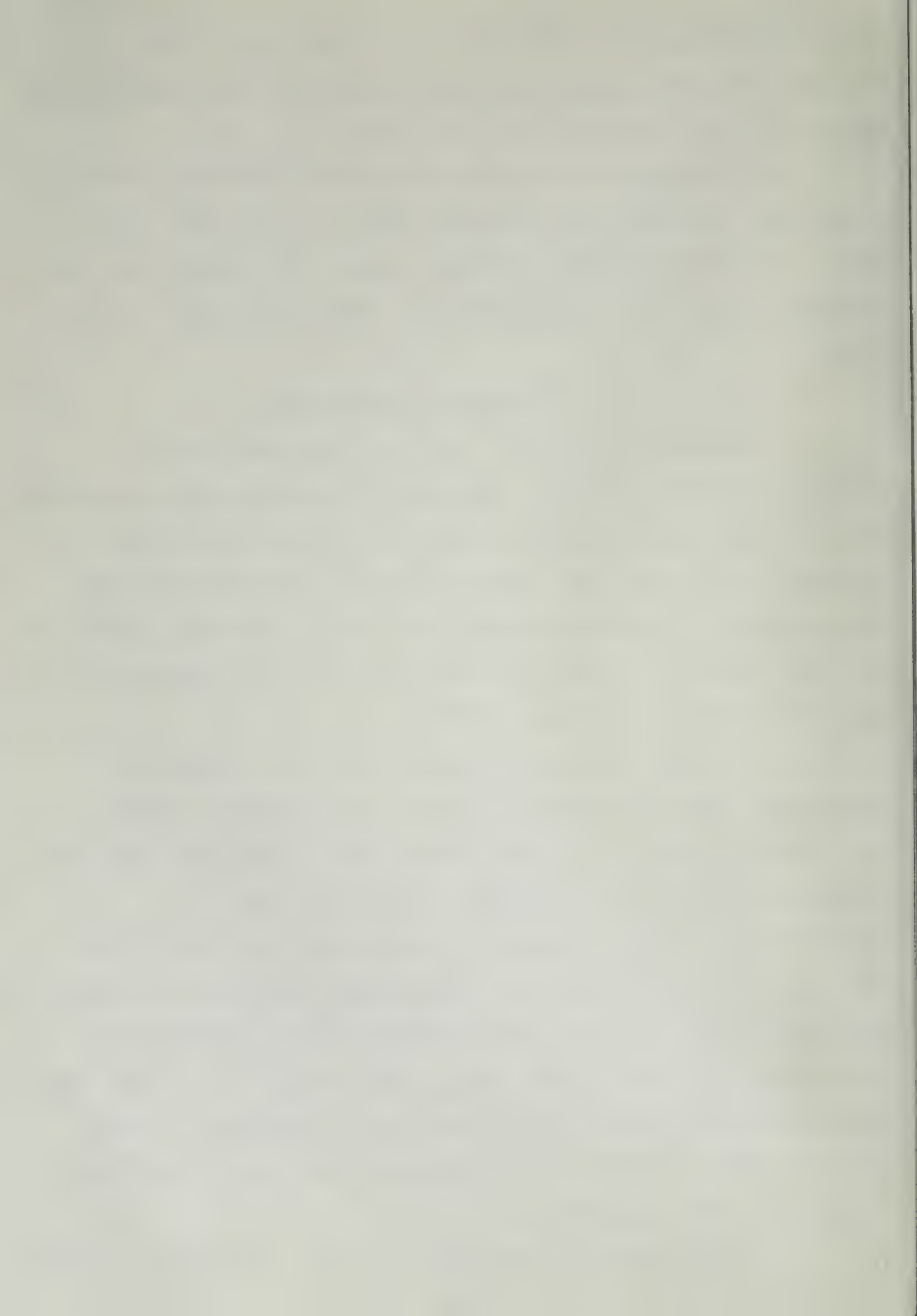
Co-conspirator Philco had referred Manfree's letter sent to it, to California Electric (Pl. Ex. Nos. 1801, 1803, 1804). However, Manfree could not acquire the Philco line from California Electric, or from Philco. (Tr. 3764-3766; 5778-5779).

(3) Frigidaire Appliances:

The 1960 letter (Pl. Ex. No. 491), addressed to Frigidaire Sales, caused Mr. Hamilton, Frigidaire Sales Appliance Sales Manager, to telephone Mr. Bernard Freeman of Manfree. He informed Mr. Freeman that appellee Frigidaire would not sell its products to discount stores, and that it would be a waste of his time and Mr. Freeman's to have a Frigidaire representative call on Manfree. (Tr. 5825-5829).

Mr. John Shaw, San Francisco Division Manager of Frigidaire, did visit Manfree's place of business. He told Mr. Alpine he could do nothing about taking a carload order for Frigidaire appliances. Mr. Shaw refused to take out a Frigidaire franchise application form he had with him in his binder. (Tr. 4314-4316). Mr. Shaw later reported to Mr. Hamilton that Manfree did not have many brands of major appliances or television sets (Pl. Ex. No. 491). The original of Pl. Ex. No. 491 showed erased handwritten notes of Mr. Hamilton. These notes no doubt related to the telephone call by Mr. Hamilton to Mr. Freeman (Tr. 4023-4028).

After receiving its letter request, Frigidaire Division



of General Motors referred Manfree to Frigidaire Sales (Pl. Ex. Nos. 493, 494A); however, Manfree could never obtain Frigidaire major appliances. (Tr. 5829).

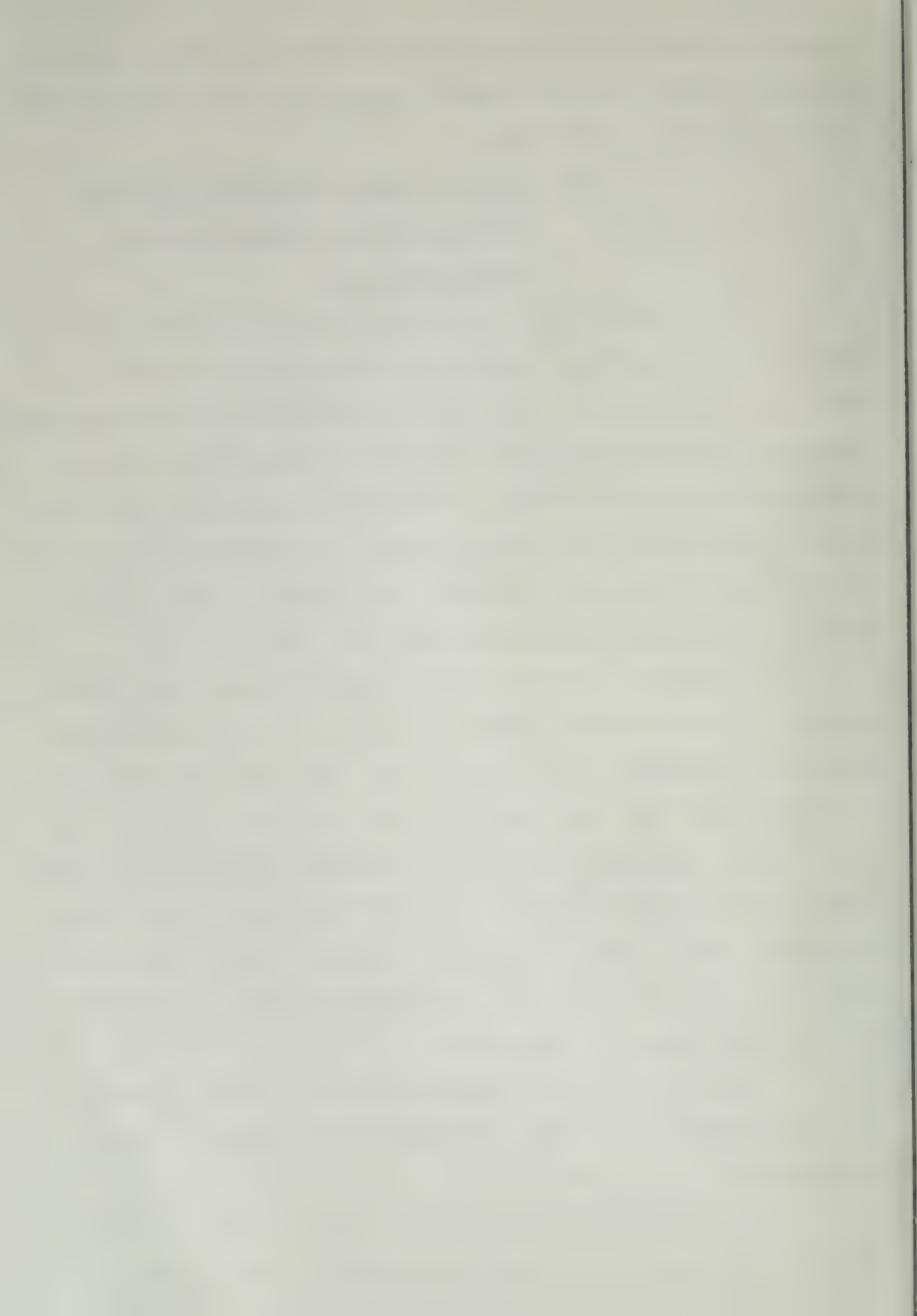
(4) General Electric (Major Appliance Division) Major Appliances and Television Sets:

Mr. William Lau, G.E.'s local sales counselor, visited Manfree after appellee's receipt of the letter dated July 13, 1960 (Pl. Ex. No. 510). Mr. Lau did not bring a franchise blank, "because it was management's decision of General Electric in Burlingame not to franchise a closed door operation" (Tr. 4350-4354). Mr. Lau told Mr. Alpine and Mr. Freeman that there were no openings for new G.E. dealers. (Tr. 4354). G.E. major appliances were never sold to Manfree (Tr. 4354).

Manfree's request to Mr. Bernard Meseth (see above) to buy G.E. products in carload quantities was made known to appellee's President, Mr. Paxton. (Pl. Ex. Nos. 514, 515, 516, 517, 518, 519, 520, 521, and 522). Mr. H. Gough, Manager of G.E.'s Major Appliance Division for Northern California, testified that he determined not to sell to Manfree in 1958, after discussing G.E.'s dealer structure with Mr. Meseth (Tr. 4152-4157; Tr. 4195). Pl. Ex. No. 514 shows the notation "Hales" on the letter (see Tr. 4168-4172).

G.E. did not sell to closed door discount stores (Tr. 5301-5302). Mr. Gough objected to this type of retail operation (Tr. 4193-4194).

Mr. Alpine's letter to G.E.'s home office in Louisville Kentucky, was referred to its Burlingame regional office



(Pl. Ex. Nos. 509, 512, 511, 513); however, Manfree could never obtain the G.E. major appliance line (Tr. 5843).

(5) General Electric - Hotpoint Appliances:

Appellee Hotpoint did not respond to appellant's letter of June 24, 1960 (Pl. Ex. No. 537). (Tr. 5801).

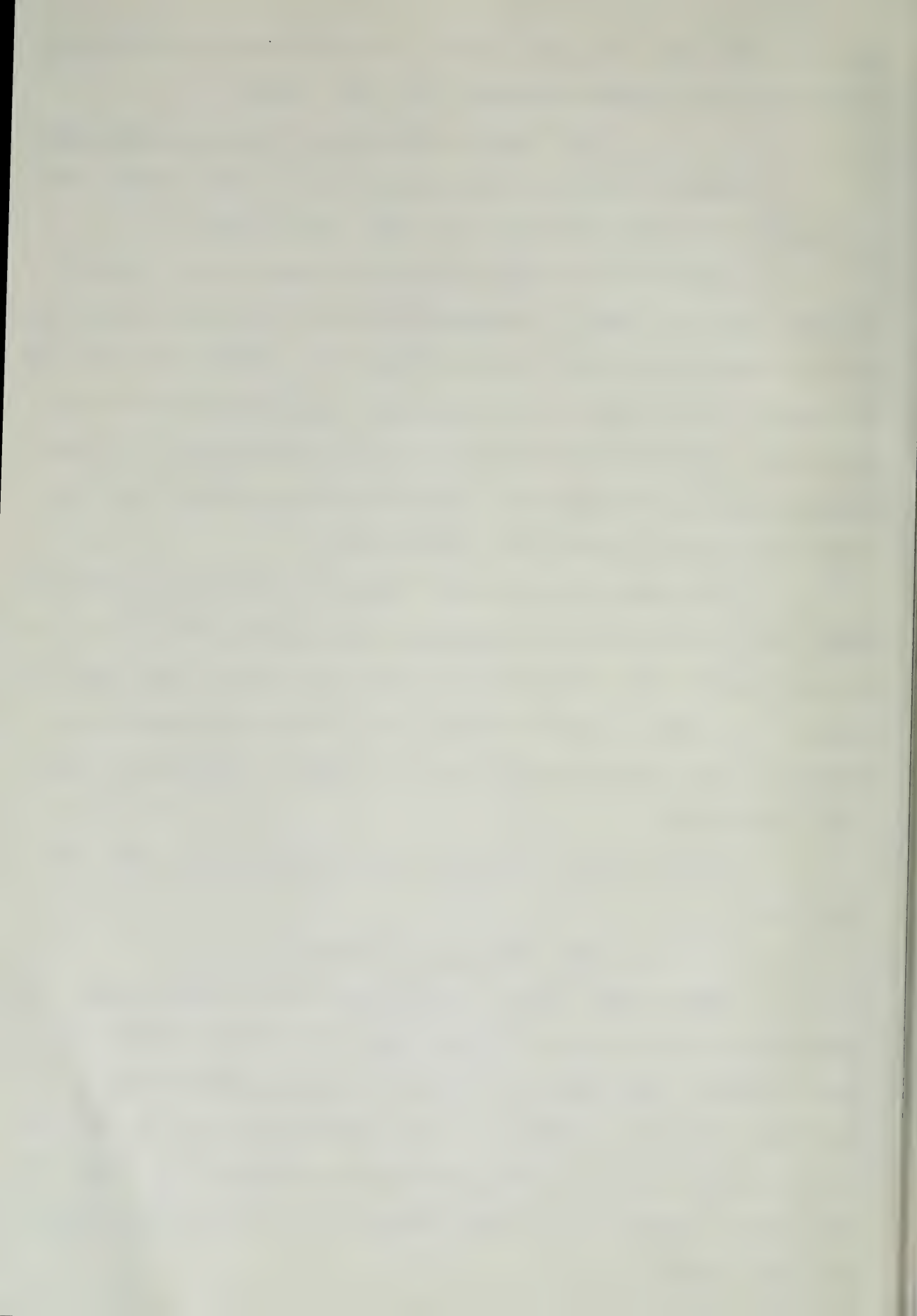
Hotpoint's Northern California distributor, co-conspirator Graybar, sent a representative, Mr. William Mayben, to call on Manfree (see Pl. Ex. No. 526). Mr. Mayben said that he had called to explain "company policy", and requested to see Mr. Alpine, who was not available. Mr. Mayben stated to other representatives of appellants that Graybar could not sell the Hotpoint line to Manfree (Tr. 5573-5581).

Mr. Mayben had told Mr. Freeman of Manfree in October, 1958, that Graybar was instituting a new sales policy, and would not be able to sell to discount stores any longer; and that he wouldn't be able to sell to department stores or other retail stores as long as he sold Hotpoint products to discount stores (Tr. 5797-5798).

Manfree could not buy Hotpoint appliances after 1958 (Tr. 5800).

(6) Maytag Appliances:

Appellant's letter to appellee Maytag West Coast, the Maytag distributor for the local area (Pl. Ex. No. 4280), was not answered. The Regional Manager of Maytag West Coast, Mr. John L. Mitchel, admitted in his testimony that he made the decision not to sell Maytag appliances to Manfree, in 1959 (Tr. 3351-3352). Maytag West Coast refused to sell to Manfree after 1959 (Tr. 3352).



Maytag did not respond to Mr. Alpine's letter to its National Sales Manager, of June 24, 1960 (Pl. Ex. No. 568); and Manfree could not obtain the Maytag line after April, 1959 (Tr. 5788).

(7) R.C.A. Television Sets:

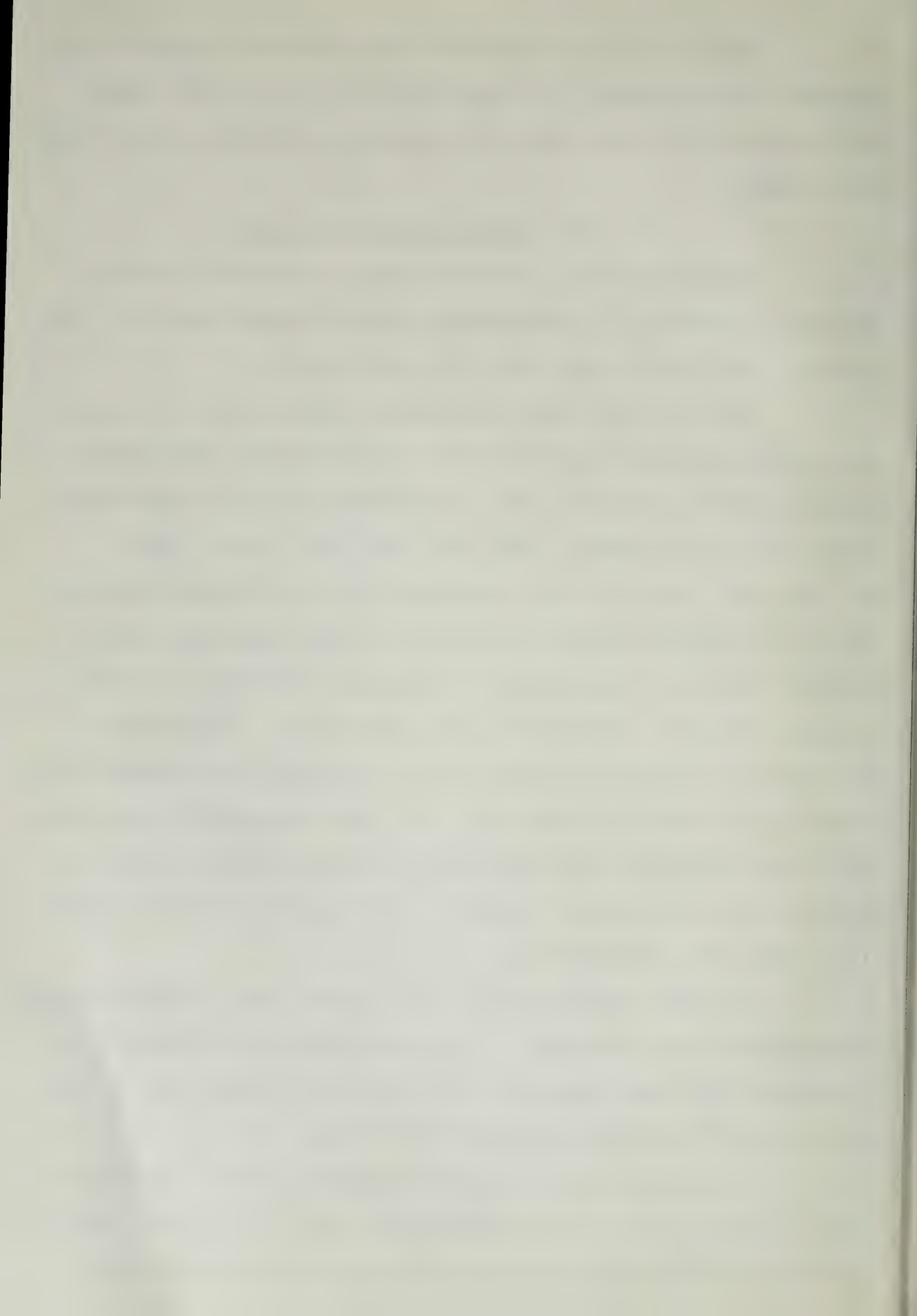
Appellee R.C.A. asserted that it did not receive Manfree's letter to it requesting product, dated July 13, 1960 (see Pl. Ex. for Id. No. 1691; Tr. 6114-6117).

R.C.A.'s Northern California distributor, co-conspirator Meyer, sent an invitation to U.S.E.'s small appliance concessionaire, Camrose, Inc., to attend an R.C.A.-sponsored trade show in September, 1960 (Pl. Ex. Nos. 1707, 1708).

Mr. Erickson, Meyer's sales manager for R.C.A.-brand products (Tr. 4847-4849), admitted that at the trade show, Mr. Marvin Boyd of Manfree, who attended, requested the right to order a carload of R.C.A. television sets from Meyer. Only after Mr. Erickson had stated that he could accept such orders solely from R.C.A.-franchised dealers, Mr. Boyd requested to see someone else from Meyer with authority to take such an order for Manfree; but no one else talked to Mr. Boyd about his request (Tr. 4885-4888; 4911-4915).

At Mr. Bernard Freeman's request, Mr. Erickson visited the Manfree store premises. When the right to purchase R.C.A. television sets was requested, he told Mr. Arthur Alpine that he could not franchise Manfree (Tr. 4918).

Following receipt of Mr. Alpine's letter of June 24, 1960, to the local R.C.A. distributor (see Pl. Ex. No. 1703), the officers of Meyer held a meeting concerning the letter



request. It was decided not to sell R.C.A. televisions to Manfree, but to sell R.C.A. radios to another concessionaire of U.S.E., Camrose, Inc. (Tr. 1217-1220). Those present were directed to report any further requests by appellants for television sets to Meyer's Vice President and General Manager, Mr. Richard Sanford (Tr. 1197).

(8) R.C.A. Whirlpool Appliances:

Appellee Whirlpool responded to Mr. Alpine's letter request to it of June 24, 1960 by referring him to its San Francisco distributor, co-conspirator Meyer (see Pl. Ex. Nos. 1710, 1711, 1714, and 1715). Whirlpool never sold appliances to appellant Manfree (Tr. 5895).

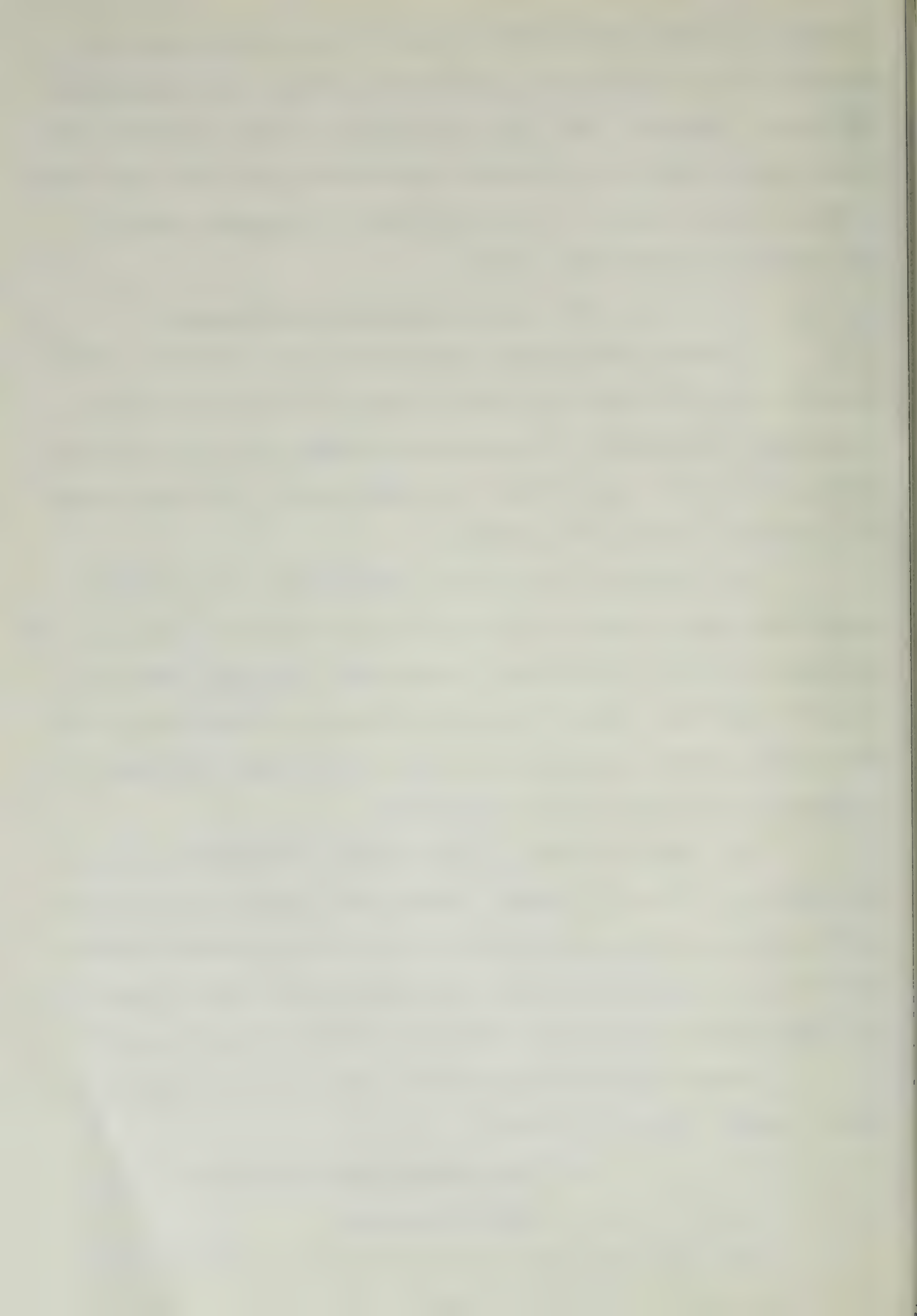
Mr. Sanford, of co-conspirator Meyer (see above), testified that he received Mr. Alpine's letter of July 25, 1960, addressed to that distributor requesting Whirlpool products (see Pl. Ex. No. 1705). Mr. Sanford gave instructions to the Whirlpool product division of Meyer not to take any action in response to the letter (Tr. 1290-1291).

Mr. Bert Carlson, a Meyer sales representative for the Whirlpool line (Tr. 4986), testified that he received requests from representatives of Manfree for Whirlpool products, and in each instance informed the other person that Meyer was not interested in selling to Manfree at that time (Tr. 4993).

Meyer never sold Whirlpool appliances to Manfree, until August, 1964 (Tr. 4994).

(9) Westinghouse Appliances and
Television Sets:

Mr. Jack Hangauer, District Manager, Westinghouse



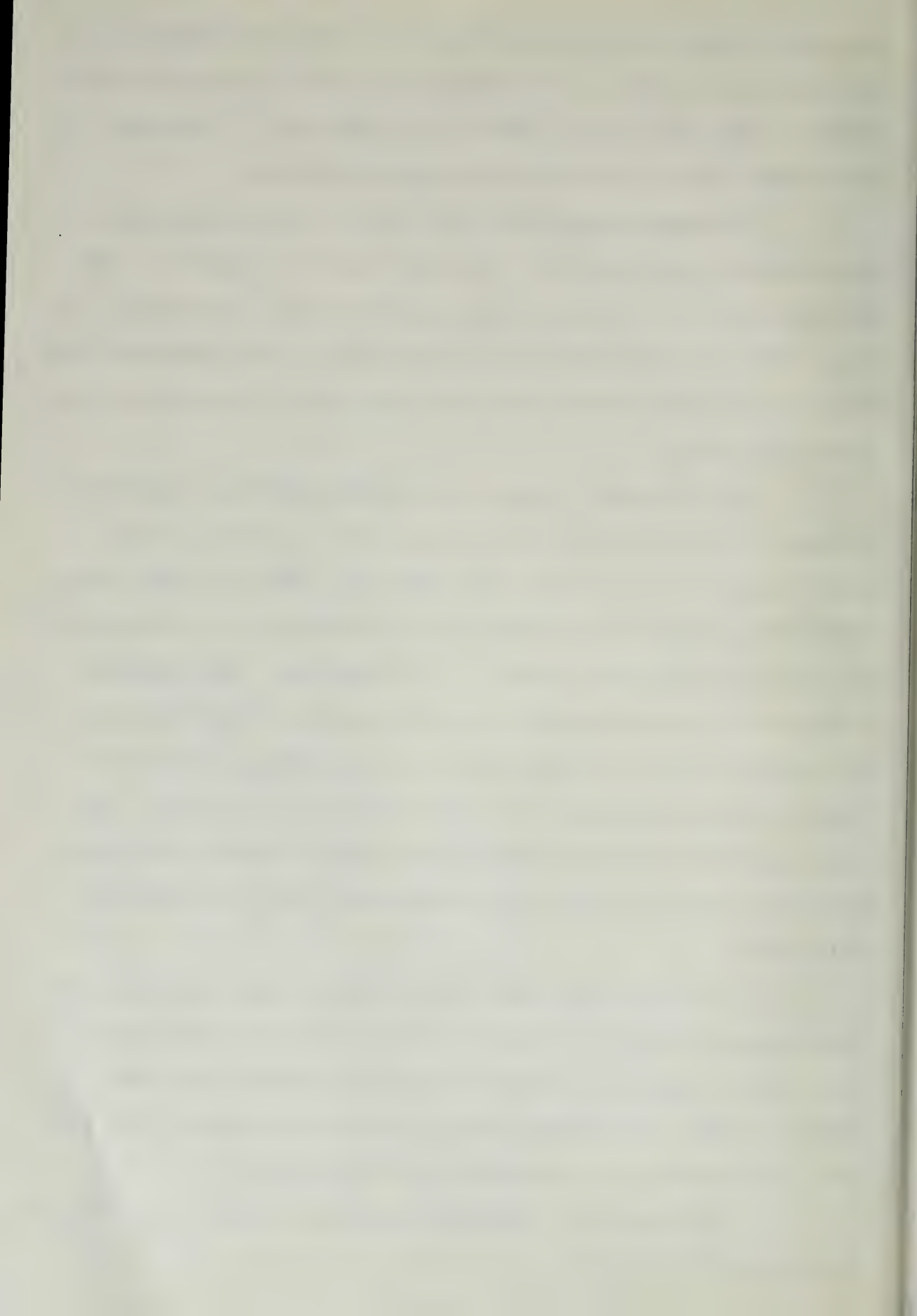
Appliance Sales Corporation ("W.A.S."), testified that he was the successor to Mr. T. B. Newby, who held the position from 1958 or 1959 until April, 1962 (Tr. 6128-6129). Hangauer described W.A.S. as a division of Westinghouse.

Hangauer testified that W.A.S. was selling major Westinghouse appliances to "Bay Mart" and "G.E.M.C.O.", who he identified as discount stores in San Jose, California, in May, 1962 (Tr. 6146; see Pl. Ex. No. 691). He understood that Westinghouse appliances were not being sold to Manfree at that time (Tr. 6147).

Mr. Bernard Freeman of appellant Manfree testified concerning his conversations with Mr. T. B. Newby, W.A.S. sales manager (see Pl. Ex. No. 1808; Tr. 5916), in the period 1958-1959, at New Joe's Restaurant in Westlake, San Francisco. Mr. Arthur Alpine was present at the meeting. When Alpine requested the Westinghouse line for Manfree, Newby replied by asking if Manfree could buy a million dollars worth of Westinghouse appliances; and when Alpine replied "no", said that Westinghouse would lose a local account worth that much business if Westinghouse appliances were sold at U.S.E. (Tr. 5910-5920).

In the period 1957-1964, Freeman also spoke on several occasions with Erik Skytte, a salesman for Westinghouse, and on each instance requested the Westinghouse line for Manfree. Each time Skytte replied that Westinghouse would not sell its products to appellant (Tr. 5920-5922).

Manfree never obtained the Westinghouse line of major appliances (Tr. 5920).



(10) Zenith Brand Television Sets:

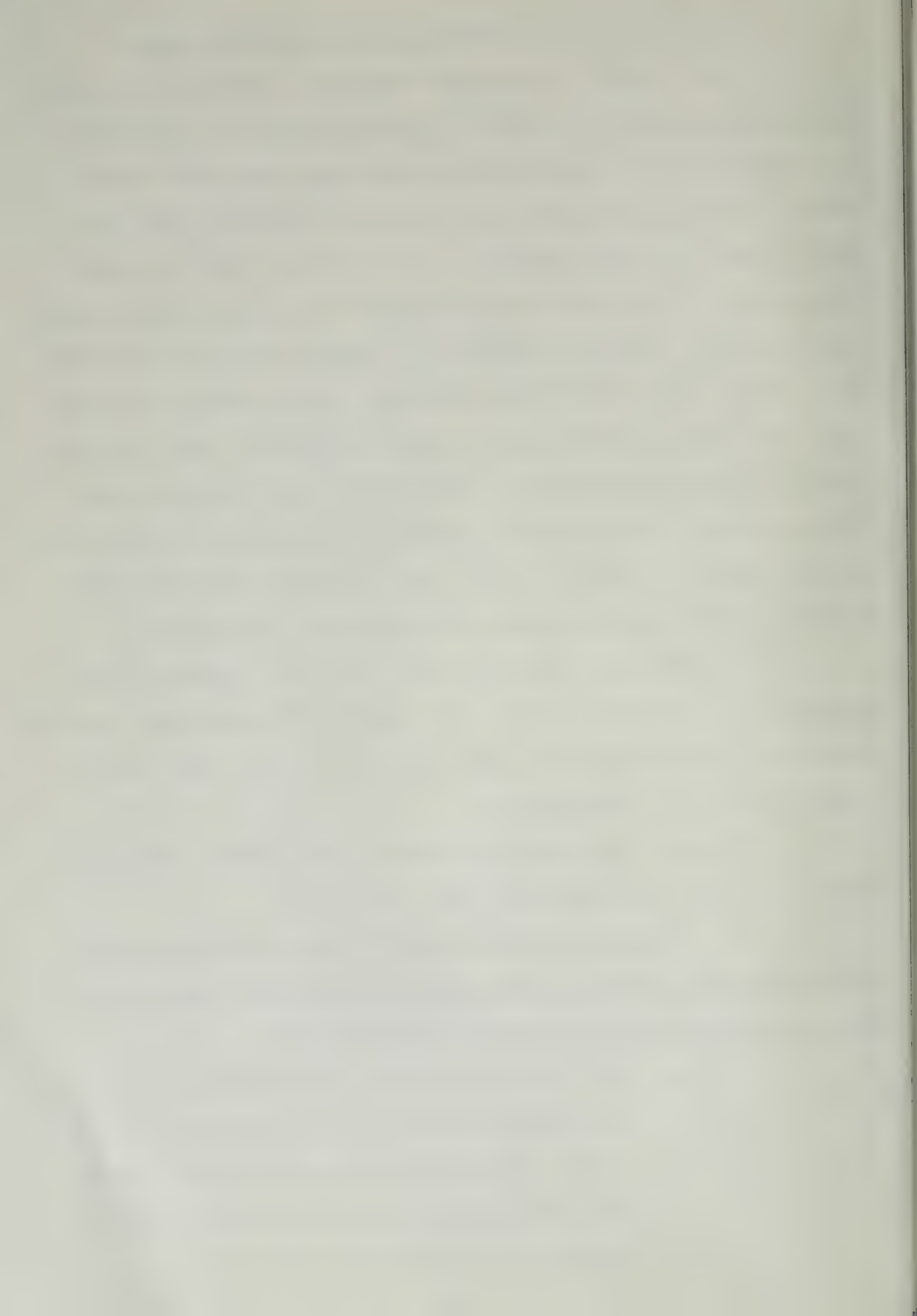
Mr. Freeman of Manfree testified concerning his conversations with Mr. J. Forni, a vice-president of co-conspirator Basford in charge of radio, phonograph and television sales, concerning obtaining Zenith-brand products from that local distributor for Manfree. In conversations with Forni held in 1962, the latter told Freeman that U.S.E. could obtain Zenith radios, because they were no longer being "fair-traded" (Tr. 5899). He admitted that discount stores located in San Jose were being provided major Zenith appliances such as television sets and phonographs, even though such products were "fair-traded", but said that Basford would not make these products available to Manfree until other discount stores in San Francisco were selling these appliances (Tr. 5896-5900).

In 1957, Mr. Bill Hayward, a Basford salesman for Zenith-brand television sets, had told Mr. Freeman that Basford could not let Manfree have such products because they were "fair-traded" (Tr. 5907-5910).

Manfree was unable to obtain major Zenith-brand appliances from 1957 until August, 1964 (Tr. 5910).

5. Joint and Collaborative Actions Among Retailer Co-Conspirators Lachman Bros., Redlick, Sterling, Macy's and Hale were Established by Substantial Evidence:

- a. The large department and furniture stores long-established in San Francisco, and having major appliance departments, demonstrated practices of doing business in close association with each other:

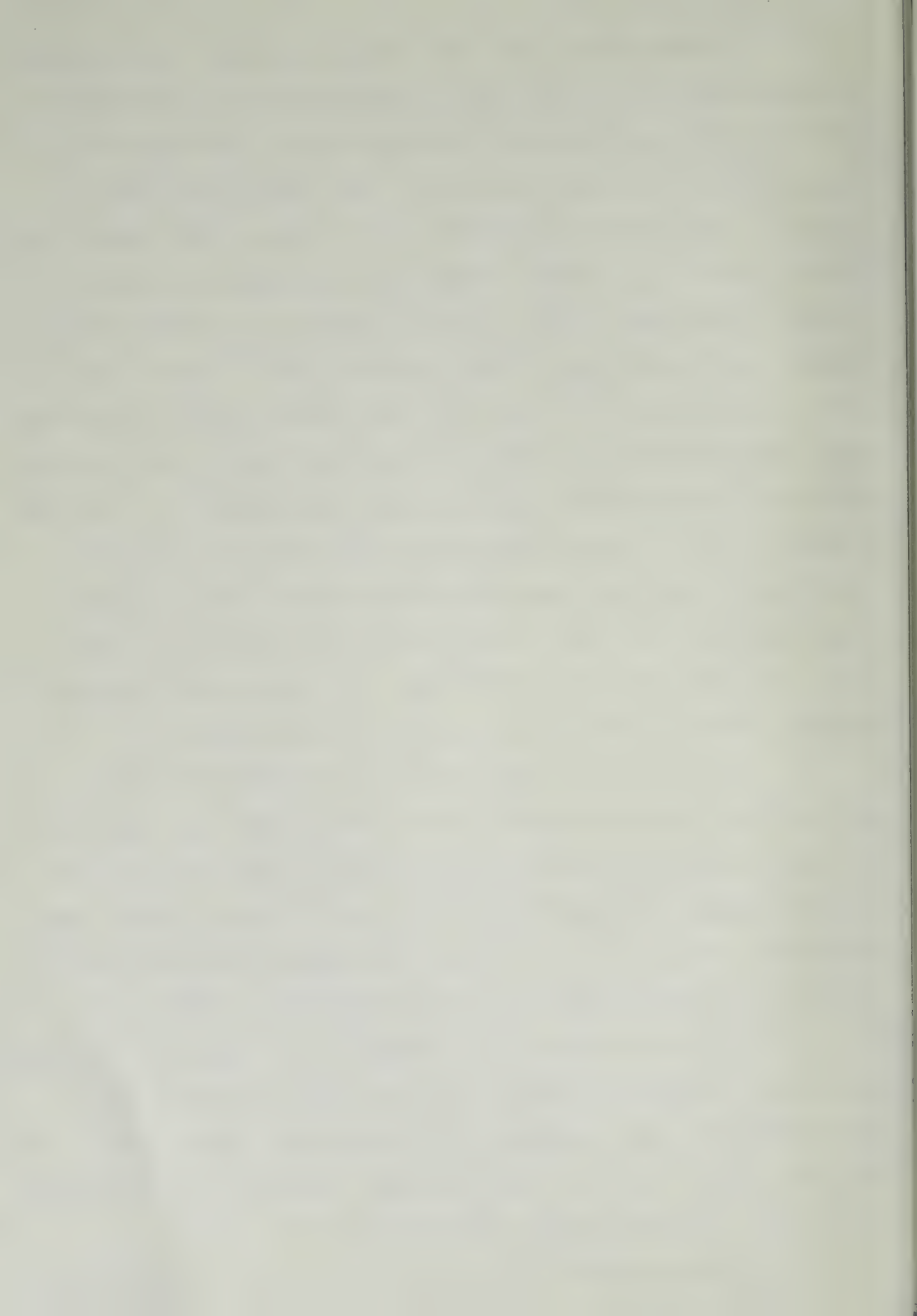


Commencing in 1957, Mr. Wesley Lachman, vice-president of co-conspirator Lachman Bros., became the first chairman of the Home Furnishing Advisory Committee of the San Francisco Better Business Bureau ("B.B.B."). (Tr. 1573; 2317-2322). Fearing a crack-down by the State of California with respect to bedding labelling, the San Francisco-area furniture stores formed a committee in the B.B.B. to establish a uniform "advertising code" to be used by San Francisco retail stores (Tr. 2317-2322; 1573-1577). This code was established by representatives of Lachman Bros., Redlick, Sterling, Macy's, The Emporium, and other San Francisco retailers (Tr. 1583-1585). It included the advertising of major appliances and television sets (Tr. 1587-1589). The Hale representative attended some of these group meetings in 1957; and the committee continued to meet until at least 1960 (Tr. 1150-1152). Co-conspirator Sterling did not become a member until 1959 (Tr. 1739-1743).

The nature of this overall relationship between the retailer co-conspirators Lachman Bros., Sterling, and Redlick is demonstrated by evidence of reciprocal visits between each other's stores (Tr. 2244-2250; 2321-2325). Retail prices were discussed between Mr. W. O. Saxe, president of Sterling, and other San Francisco furniture store owners (Tr. 2456).

Co-conspirators Hale, Lachman Bros., Macy's and Redlick followed a practice of making "accommodation sales" of major appliances and other products, to assist each other. (See Pl. Ex. Nos. 434, 435, 444, 445, 448, 450(A,B), 451(A,B); Tr. 1035-1036; 1310-1311; 1508-1510; 1512-1513; 1599-1600.)

Representatives of co-conspirators Hale, Lachman Bros.,



Frigidaire, Graybar, Basford, Meyer, Sylvania, and Westinghouse, and appellees G.E. and Hotpoint, also met each other at meetings of the Northern California Electrical Bureau (N.C.E.B.). (Tr. 3125-3129; 3136-3141). The N.C.E.B. also had a particular San Francisco unit of which Hale, Lachman Bros., Sterling, Redlick, Macy's, G.E., Frigidaire, Graybar, and Lancaster were members (Tr. 1520, 1934-1935, 1950).

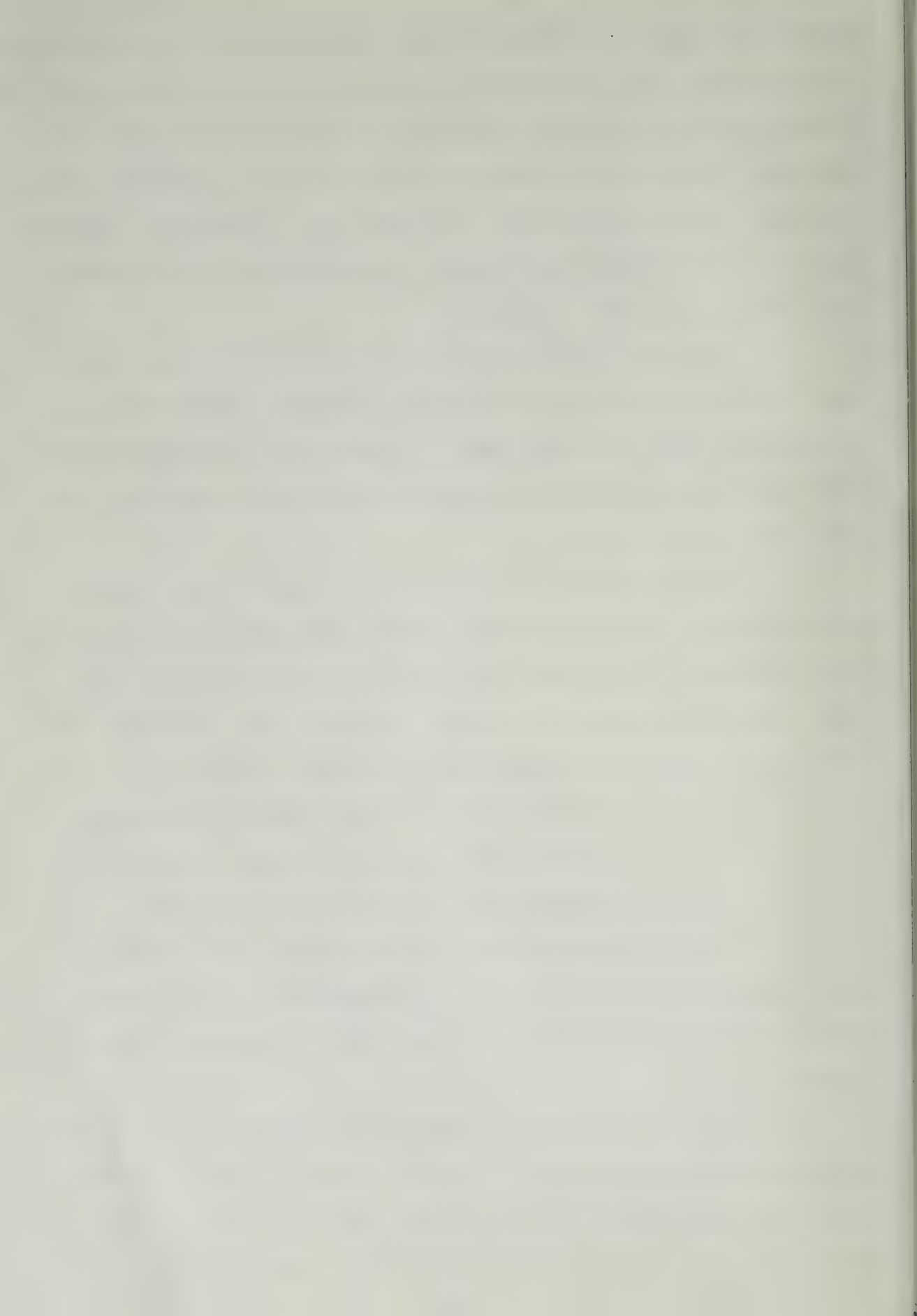
Retailers Lachman Bros., Redlick and Sterling were also members of the Retail Furniture Dealers' Association of California, their officers were officers of this association, and their representatives met each other at its meetings (Tr. 2292-2298; 2444-2446).

The San Francisco retailers "shopped" each other's stores to keep an eye on retail prices of similar products, and some admittedly discussed retail prices upon occasions when their representatives would meet. (See Tr. 567, 897-902, 1311-1313, 1671, 1675-1678, 2244-2250, 2281-2282, 2456.)

- b. Evidence of retailers' joint refusal to purchase Maytag products at a time when Manfree was selling Maytag products:

Co-conspirators Hale, Lachman Bros., and Sterling would not handle the Maytag line of appliances until after the point in 1959 when appellant Manfree had its Maytag franchise revoked.

Mr. John T. Mitchel became the regional manager for appellee Maytag West Coast in 1959. At that time he visited Hale (Tr. 3316-3324), Lachman Bros., Sterling, and other San Francisco retail stores (Tr. 3319-3324). Hale received a



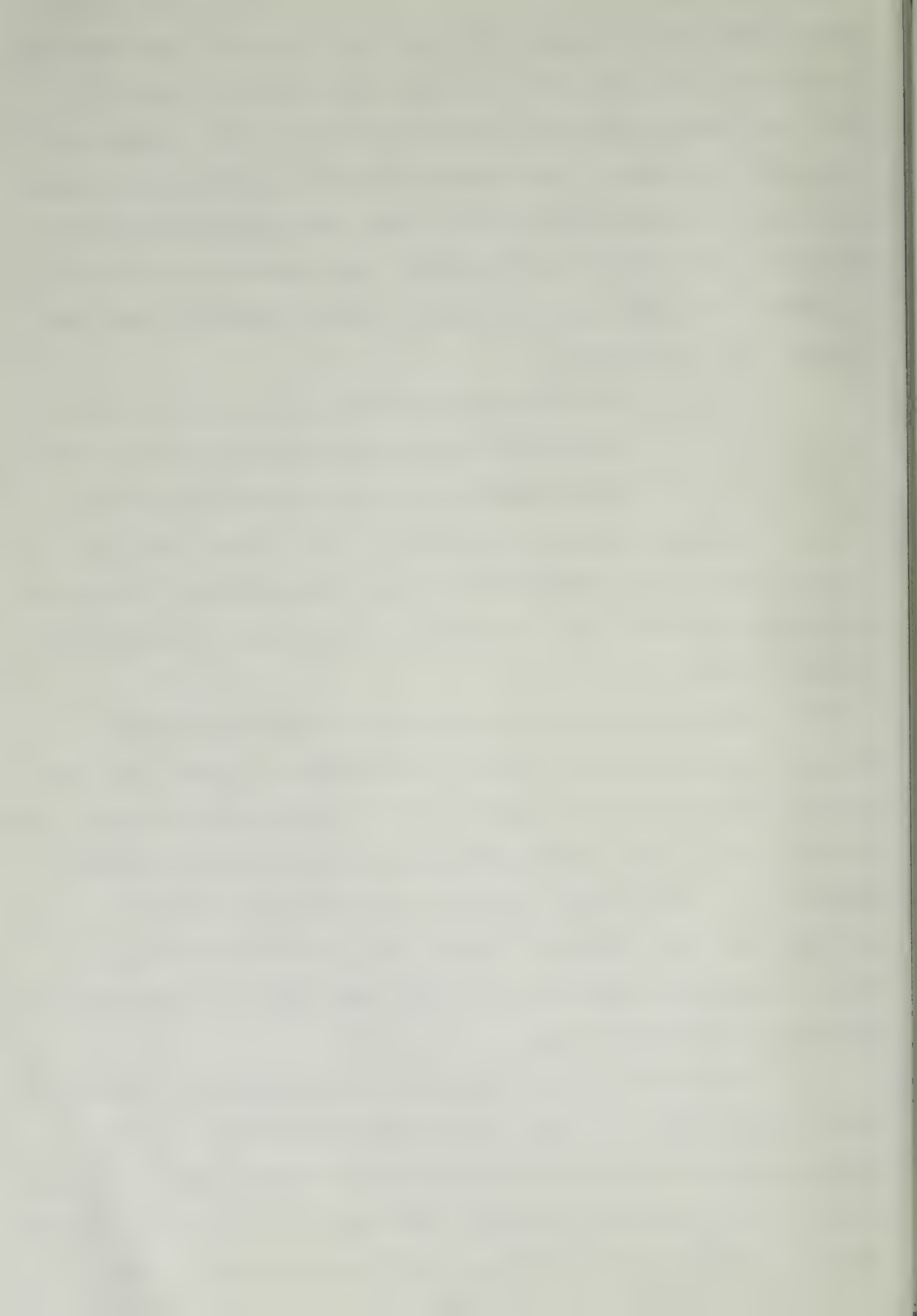
Maytag franchise in March, 1959 (Pl. Ex. No. 313); and Sterling in October, 1959 (Pl. Ex. No. 318). Mr. Mitchel, early in 1959, had found Sterling's Maytag purchases to be disappointing (Tr. 3335-3336). He likewise found the purchases of Maytag products by Lachman Bros. to be below that which he felt desirable (Tr. 3336-3337). Lachman Bros. was franchised by Maytag in 1960; until then its purchases of Maytag products had been limited (Tr. 3336-3337).

c. Evidence of retailers' joint refusal to purchase Hotpoint-brand appliances at a time when Manfree was selling these products:

During the period of 1957 to 1958, when appellant Manfree was selling Hotpoint-brand major appliances, co-conspirators Hale, Lachman Bros. and Sterling were not purchasing the Hotpoint line.

Mr. Mayben became the District Appliance Manager, Central Pacific District, for co-conspirator Graybar, the local Hotpoint distributor, in April, 1959. He then called on Mr. Tobin of Sterling to find out why that store was not buying Hotpoint products (Tr. 3063-3065). He also called on Mr. Laird of Lachman Bros. for the same reason (Id.); and in calling on Macy's, requested representatives of that store to increase its purchases of Hotpoint (Id.)

Immediately after Manfree was cancelled as a Hotpoint dealer in the fall of 1958, Mr. Mayben instituted a strict advertising policy whereby Graybar established "suggested" price schedules for Hotpoint products, and which conditioned the granting of co-operative advertising funds to retailers on their



advertising of Hotpoint products at the stated Graybar suggested retail price (see Pl. Ex. Nos. 339, 340; Tr. 6089-6095).

Appellants established that just prior to Manfree's removal as a Hotpoint dealer, co-conspirator Graybar announced to the representatives of the key retail accounts of Hotpoint in San Francisco, at a breakfast meeting at the Palace Hotel, that Graybar had changed its policy concerning dealer outlets, and would no longer service or franchise discount stores (Tr. 6120-6125). Thereafter, and after Manfree was removed as a Hotpoint dealer, co-conspirators Sterling, Hale, and Lachman Bros. became large purchasers of Hotpoint-brand appliances (Pl. Ex. No. 4267).

Hotpoint, through its distributor, Graybar, also instituted the merchandising gimmick of the so-called "back-door sale" by arrangement with co-conspirator Sterling, in 1959. (See Tr. 1716-1732; 2238-2240). The "back-door sale" was a special sale, held usually on a Sunday, which required tickets for admittance. It was not open to the general public, and the sale prices were based upon the distributor's suggested list prices (Tr. 1732-1734; 2233-2240; 1626-1627. Announcements of the sale were mailed to a large number of potential customers, which included a price brochure and admission tickets. These announcements, called "mailers", were paid for by the advertising funds provided by the factories making the products involved, administered through the respective local distributors. (Tr. 2452-2455; see Pl. Ex. Nos. 455 and 212. See, also, Tr. 1725-1726, 1731-1732; 1613-1625; 2237-2240; 4119-4127; 4299-4301; 4998; and 5258-5261.)

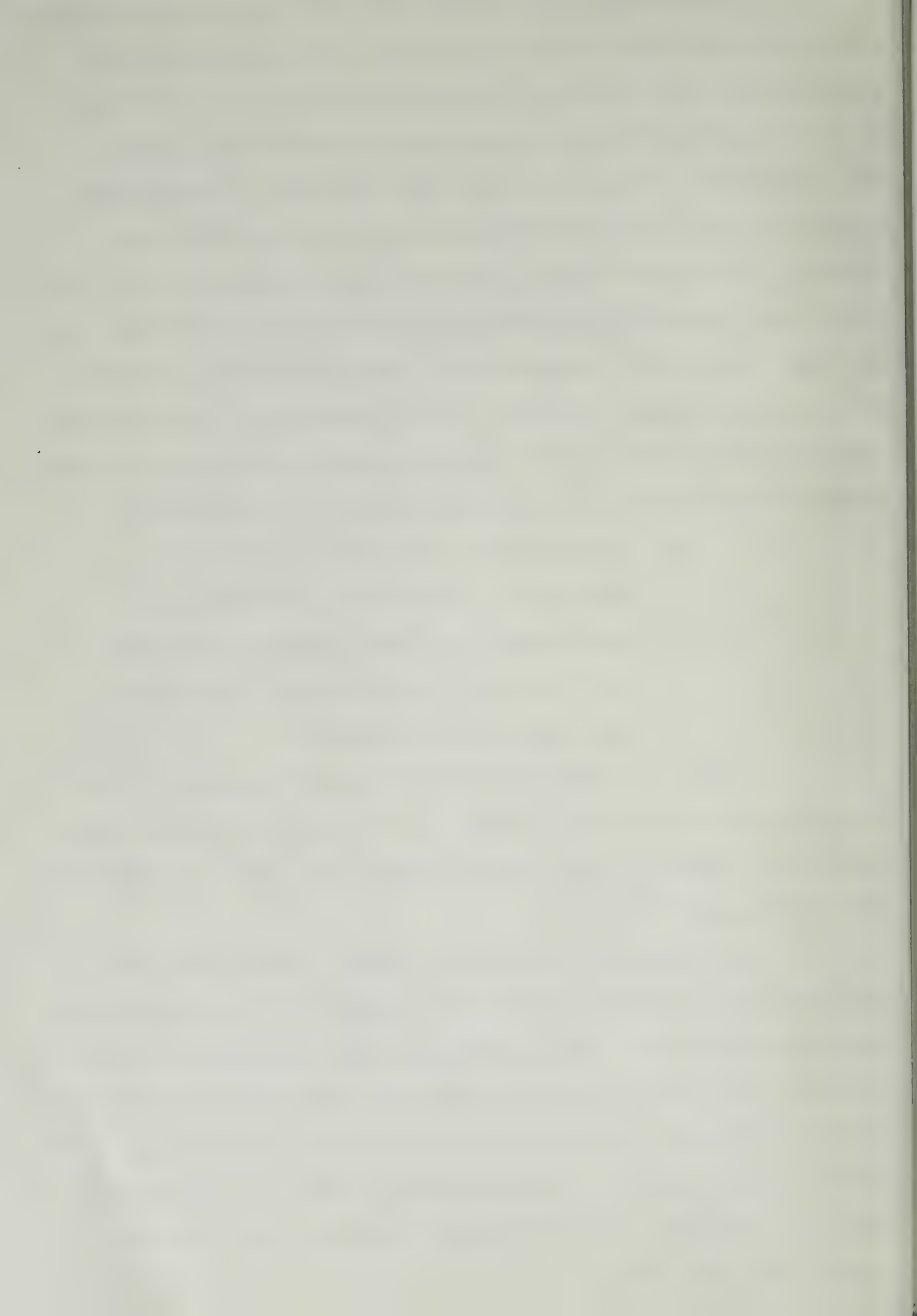


The evidence also showed that the retailer co-conspirators would ask their local distributors which San Francisco retail stores were handling the particular line of major appliance, before the retailer would agree to stock the product (Tr. 1667-1668; 1012-1014; 2342-2346). Redlick, it was shown, complained to a California Electric salesman in 1962 that "Alec's", a discount store in the Westlake district of San Francisco, was requesting the Philco-brand appliance line (Pl. Ex. No. 483). Macy's and Lachman Bros. also registered complaints about "price-cutting" on G.E. -brand products by other San Francisco retailers (Tr. 4370). Macy's refused to compete on retail prices for Westinghouse-brand appliances (Tr. 6156-6157).

d. R.C.A.-brand television, and R.C.A.-Whirlpool, Frigidaire, and G.E.-brand appliances were made available to other San Francisco retailers, but were never made available to Manfree:

It was stipulated that Meyer always refused to sell R.C.A.-brand televisions to Manfree. The evidence showed that Manfree was unable to buy the Whirlpool line. See Tr. 5608-5609; 4921; 4990-4994.

Mr. Erickson, salesman for Meyer, testified that the San Francisco retailers to whom his company sold such products generally advertised these products at the suggested list price (Tr. 4975). He further testified that he would not recommend selling R.C.A. Victor television sets to Manfree, because he believed this would result in a de-emphasis of this line by Meyer's other San Francisco retail accounts which were not discount stores (Tr. 4895-4911).

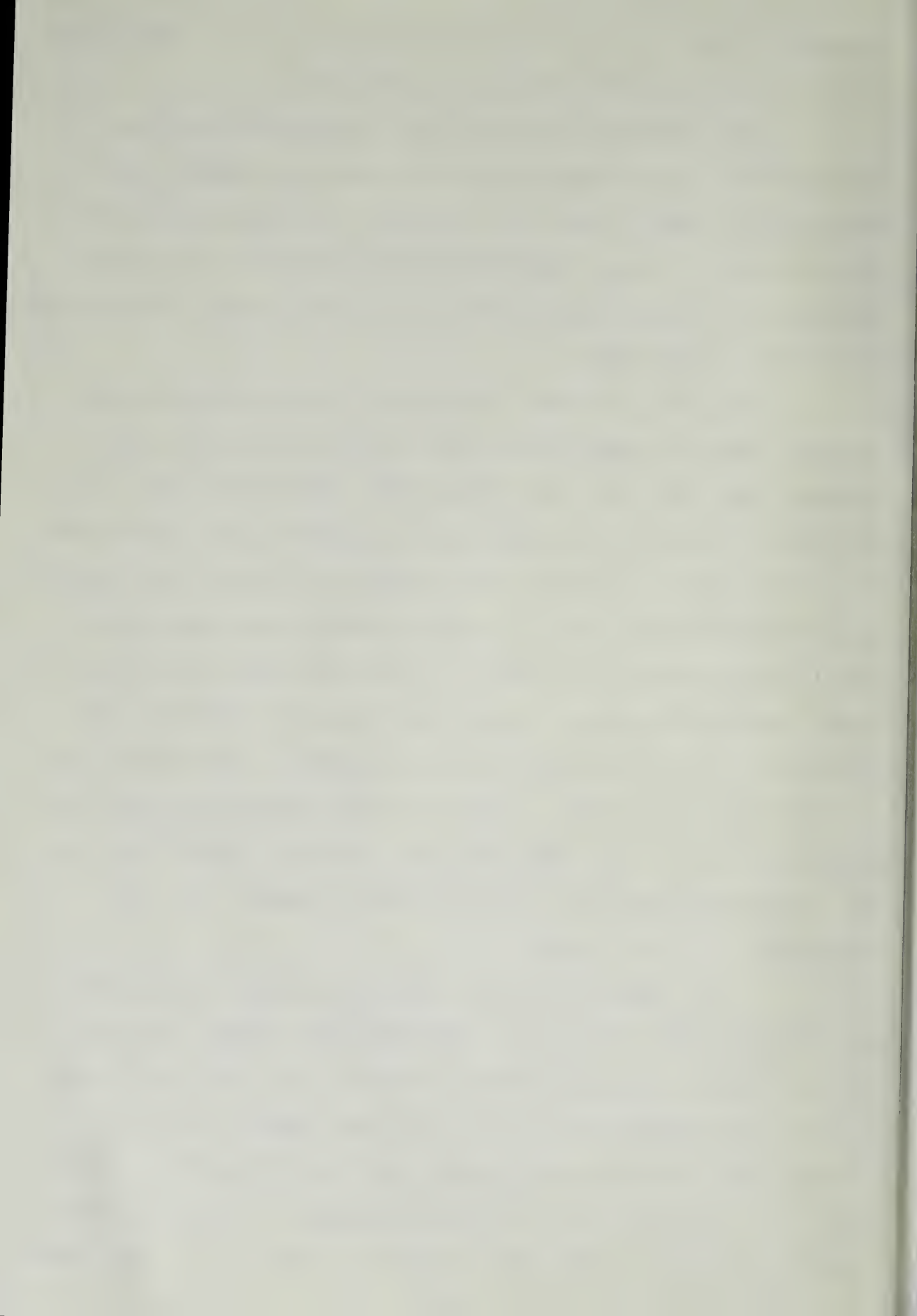


request of Hale, to determine the source of R.C.A.-brand television sets being sold there (Tr. 1017-1022).

Mr. Sanford, a witness with extensive experience in selling major appliances, both for a retailer (Hale), and a distributor (Meyer) (see Tr. 504-510), testified he believed that in order to have downtown retailers continue to carry Whirlpool products, Meyer would not be able to sell to discount stores (Tr. 1288-1289).

In 1957, the key advertisers for Frigidaire-brand products were co-conspirators Hale, Sterling, Redlick and Lachman Bros. (Pl. Ex. Nos. 2058, 2060, 2061-2064, 2068, 2070, and 2059). Hale did not carry the Frigidaire line after 1959 (Tr. 4216-4217). A Frigidaire salesman, Mr. John Shaw, testified that Frigidaire was in need of downtown San Francisco retail representation in 1960; and that Manfree was not solicited, because Frigidaire wanted the "downtown" outlets (Tr. 4305-4307). Mr. Hamilton, another Frigidaire representative, in 1960 told Mr. Freeman of Manfree that Frigidaire would not sell its products to a San Francisco discount store, and that Mr. Freeman was wasting his time making requests for the Frigidaire line (Tr. 5828).

Co-conspirators Hale, Macy's, Lachman Bros., Redlick and Sterling were the largest San Francisco retail purchasers of G.E.-brand major appliances. (See Pl. Ex. Nos. 148, 149). A G.E. sales representative, Mr. Bernard Meseth, told Mr. Freeman at a time when the latter was requesting G.E. products that G.E. could not sell to Manfree because of "present dealership structure" in San Francisco (Tr. 5842-5845). Mr. Meseth

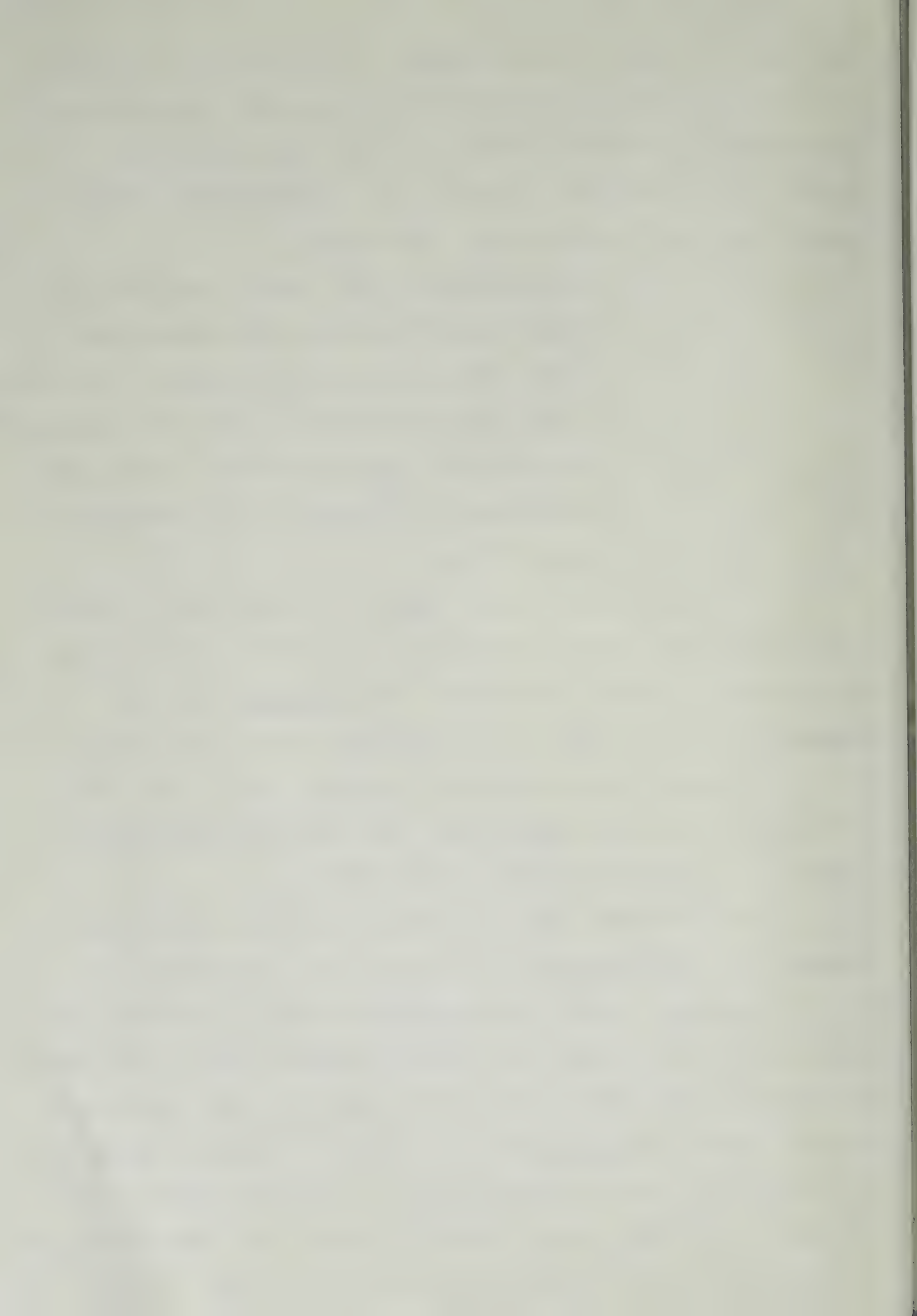


testified that there was an element of risk to G.E. in losing its major appliance business with San Francisco department and large furniture stores, should G.E. sell its products to Manfree (Tr. 5264-5265). Manfree, as a consequence, never obtained G.E.-brand products (Tr. 5843-5844).

e. Co-conspirators Hale, Macy's, Redlick and Lachman Bros. were extensive advertisers in the San Francisco morning newspapers, but not in the evening newspaper. Sterling requested a meeting with representatives of the evening newspaper to discuss U.S.E. advertising carried by it:

Co-conspirators Hale, Macy's, Lachman Bros., Redlick and Sterling were among the principal advertisers in the two San Francisco morning newspapers, the Chronicle, and the Examiner (Tr. 2305-2309). The Chronicle advertising manager had a discussion with an officer of Macy's, soliciting the latter's views about the possibility that the Chronicle would accept U.S.E. advertising (Tr. 6878-6880).

In December, 1960, Mr. Aro, classified advertising salesman for the Examiner, solicited U.S.E. advertising from Mr. J. Mittelman, U.S.E.'s advertising manager. However, after taking appellant's copy, Aro called Mittelman back to say that the ads would not even be run by his paper in the classified section, as the Examiner felt U.S.E. was a "discount house" and its policy was not to accept discount store advertising; that ads from such stores would directly compete with advertising of regular downtown San Francisco stores such as Hale, Macy's,



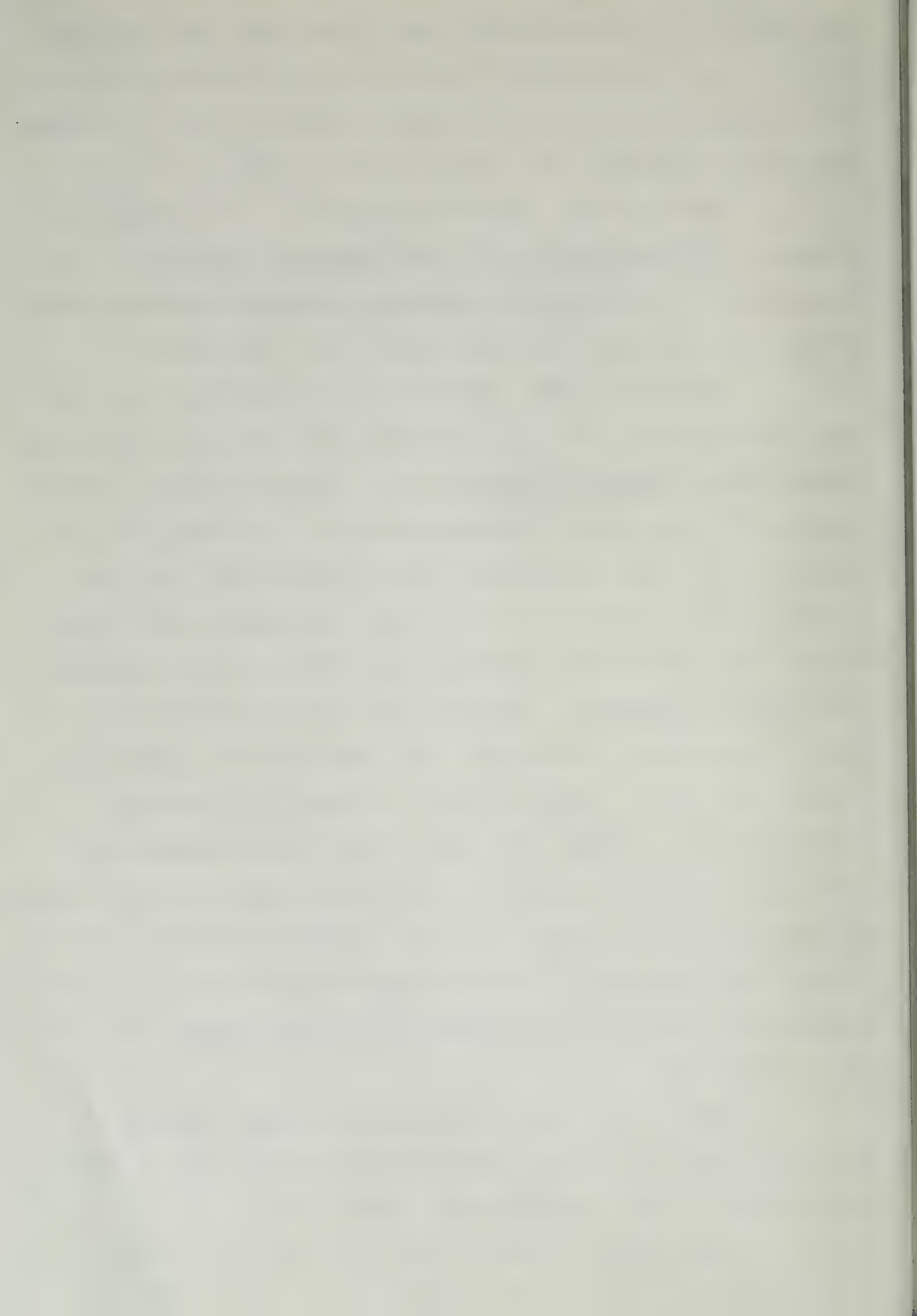
The Emporium, and Roos/Atkins, who did not want the Examiner to run U.S.E.'s advertising. Aro also told Mittelman that he had checked all this out with people senior to him in the newspaper (Tr. 2105-2123; Borg-Warner Ex. No. 9024).

Lachman Bros. did not advertise in the afternoon newspaper, The Call Bulletin (later News Call Bulletin), for the specific reason that the newspaper accepted discount store advertising, such as that from U.S.E. (Tr. 2035-2054).

On June 8, 1960, Sterling's vice-president and general sales manager, Mr. R. E. Schreck, met with the advertising manager of the News Call Bulletin, Mr. Wallace Brooks, and the newspaper's advertising representative, Mr. Al Leary, at the Olympic Club in San Francisco. U.S.E. advertising was discussed at the meeting, which followed a protest by Mr. Schreck to Mr. Leary concerning certain U.S.E. advertising carried by the News Call Bulletin. Although Mr. Schreck said he could recall no details of the meeting (Tr. 1763-1768) Mr. Leary admitted that U.S.E. was the subject of discussion with Mr. Schreck at the luncheon (Tr. 5689-5700). This meeting also took place at a time approximating that during which Mr. Schreck, Mr. Lachman (Lachman Bros.) and Mr. Redlick (Redlick), among others, were meeting in connection with establishing a uniform advertising code for San Francisco retailers (supra) (Tr. 2327-2333, 1761-1763).

Redlick did not advertise in the Call Bulletin or its successor newspaper, during 1957 and 1958, while U.S.E. was advertising in that newspaper (Tr. 2305-2309).

Advertising by Hale in the Call Bulletin dropped



substantially in amount, during 1959. (Pl. Ex. No. 4343; Tr. 331-333).

- f. Evidence of common distributor-manufacturer action toward another San Francisco membership discount store during the applicable period:

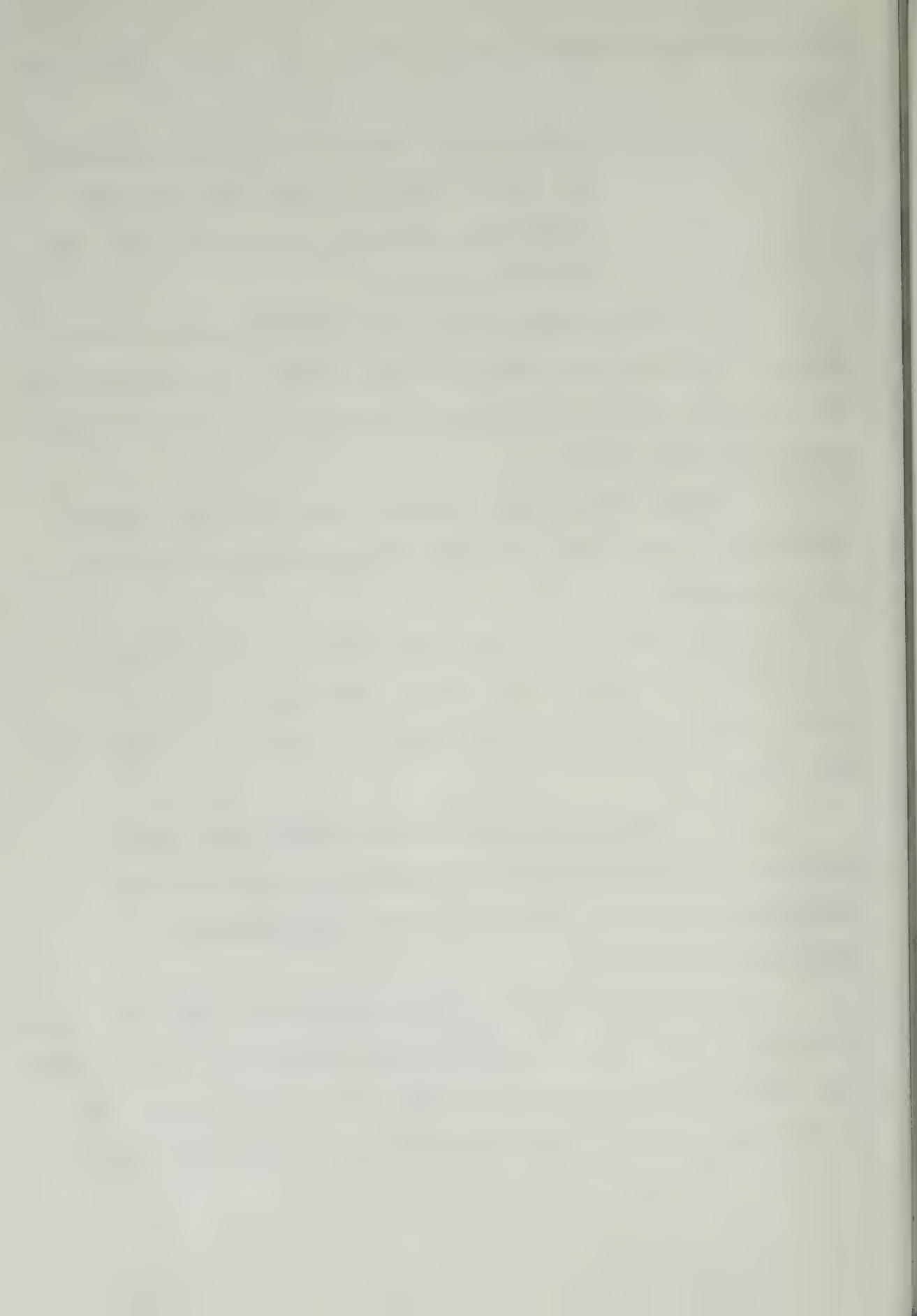
Co-conspirator Graybar cancelled the franchises of another San Francisco discount store, "GET", at approximately the same time that it was cancelling Manfree's Hotpoint franchise (Tr. 3068-3080).

Maytag West Coast likewise cancelled GET's Maytag franchise at the time it was also disenfranchising Manfree (Tr. 3332-3333).

Co-conspirator Meyer and appellee G.E. refused the requests of GET for the R.C.A., Whirlpool, and G.E. lines of major appliances and television sets (Tr. 4919; 4361-4366; 5246).

6. Joint and Collaborative Action Among the Appellee and Co-conspirator Manufacturers of Major Appliances and Television Sets Was Clearly Established By Substantial Evidence:

The manufacturers of major appliances who were involved in this case, Frigidaire, Borg-Warner (Norge Division), G.E., Whirlpool, and Hotpoint, were and are all members of the National Electric Manufacturers' Association ("N.E.M.A.").



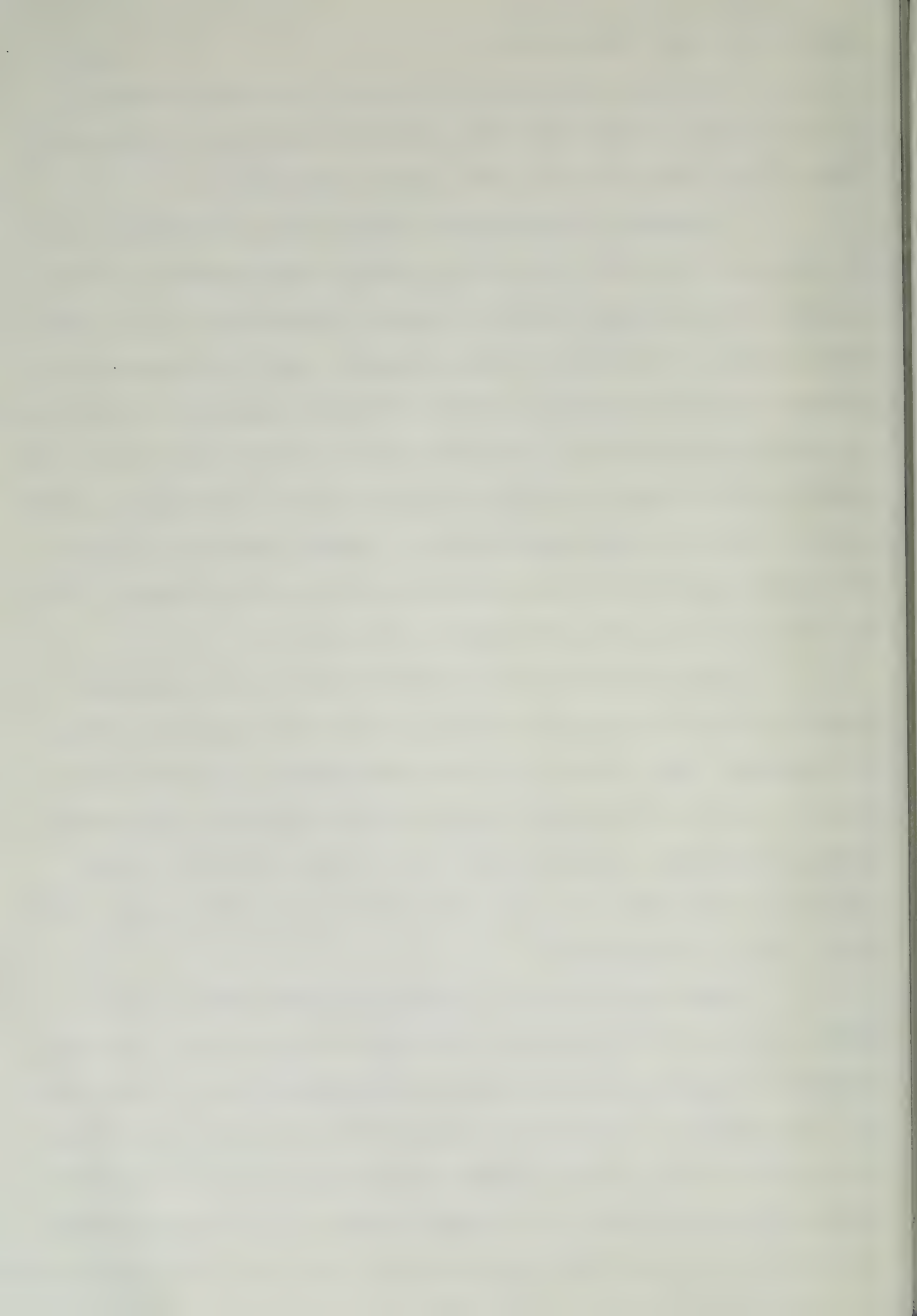
(See Pl. Ex. No. 2090 (A-G).)

N.E.M.A. maintains a Consumer Products Division, which concerns itself with the products involved in this case. (See Pl. Ex. for Id. Nos. 3006, 3007, 3008-3011.)

As part of the members' activities in N.E.M.A., each is required to report its sales of major appliances in every county of the United States, by dealer classification, to the Association. Pursuant to these reports, each manufacturer requires its distributors to submit detailed reports of units sold to various retailers in the distributor's sales territory. The information is then sent by the manufacturers to N.E.M.A., tabulated, and thereafter each N.E.M.A. member receives a county-by-county analysis of its percentage share of the market. (Pl. Ex. for Id. Nos. 3009; 3000-3005; 2091-2099.)

Appellants offered to prove that N.E.M.A. members have agreed to prevent non-members from obtaining this market information, have agreed to common definitions of retail customers, and have exchanged specification and price information among themselves. (See Pl. Ex. for Id. Nos. 2093 (A, C-E); 2094 (A, C-N), 2095 (A, F-G), 2097 (A, F, S), 2098 (A, M), 3003, 3010; see Tr. 6457-6470).

Appellants further offered to prove that in June, 1960, at a Board of Directors Meeting of the N.E.M.A. Consumer Products Division, representatives from Borg-Warner, Frigidaire, G.E. and Whirlpool discussed the establishment of a fixed distribution pricing system, which contemplated that all distributors and dealers would be charged the same price by individual manufacturers (and their distributors), and that the manufacturer

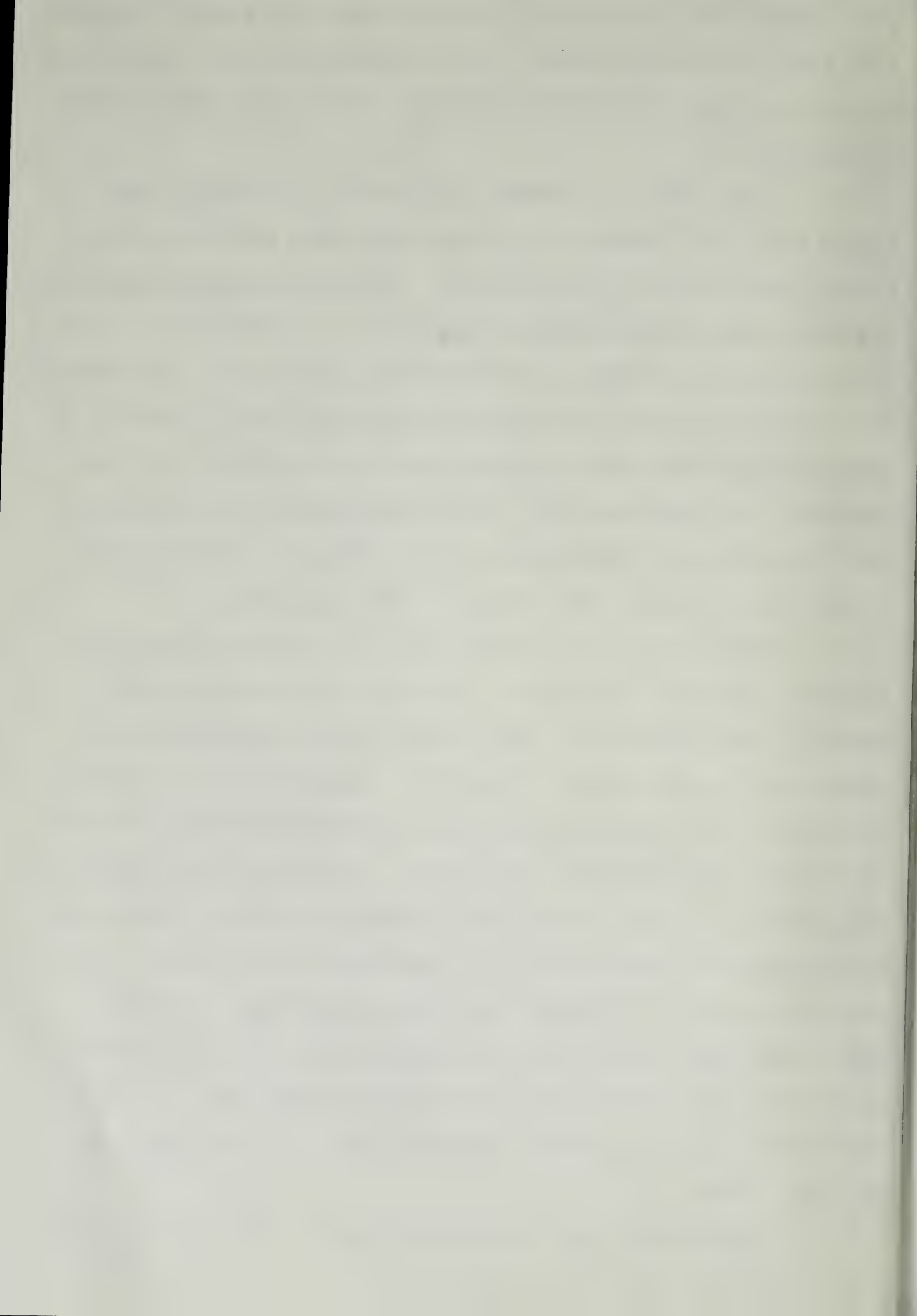


would agree with each other that each would not permit deviation from such established retail and distributor prices. (See Pl. Ex. for Id. Nos. 3006, 3007, and 431. The latter appears herein as Appendix B.)

Appellees Borg-Warner, Frigidaire, Hotpoint, and Maytag were also members of the American Home Laundry Manufacturers' Association ("A.H.L.M.A."). This organization assembled the same types of statistical information as did N.E.M.A., for the products with which its members were concerned. The members of A.H.L.M.A. agreed to a uniform advertising code, relating to proper advertising conduct on the part of retailers, and they insisted that retailers sign certain affidavits of "compliance" with the A.H.L.M.A. Advertising Code. (See Pl. Ex. No. 2, and Pl. Ex. for Id. Nos. 3036 (AE-AF), 3025, and 3026.)

The A.H.L.M.A. Advertising Code was significantly different from the advertising practices recommended by the Federal Trade Commission: The former speaks specifically of references in advertising of members' products (by retailers or otherwise) of a "manufacturer's or distributor's list price" or "suggested retail price"; and of such "advertised list price or suggested list price" being the "current list price" which the manufacturer or distributor has "published to the trade". (See Pl. Ex. No. 2, at page 1 of A.H.L.M.A. Code). On the other hand, the latter makes no reference to a manufacturer's or distributor's list price, but rather simply refers to an "established retail price". (See Pl. Ex. No. 2, at pages 5-6 of F.T.C. Code).

Appellants also offered evidence, which was rejected,



showing that A.H.L.M.A. members exchanged pricing information, and data about individual company's specifications for various appliances. (Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3029, 3032, and 3037.)

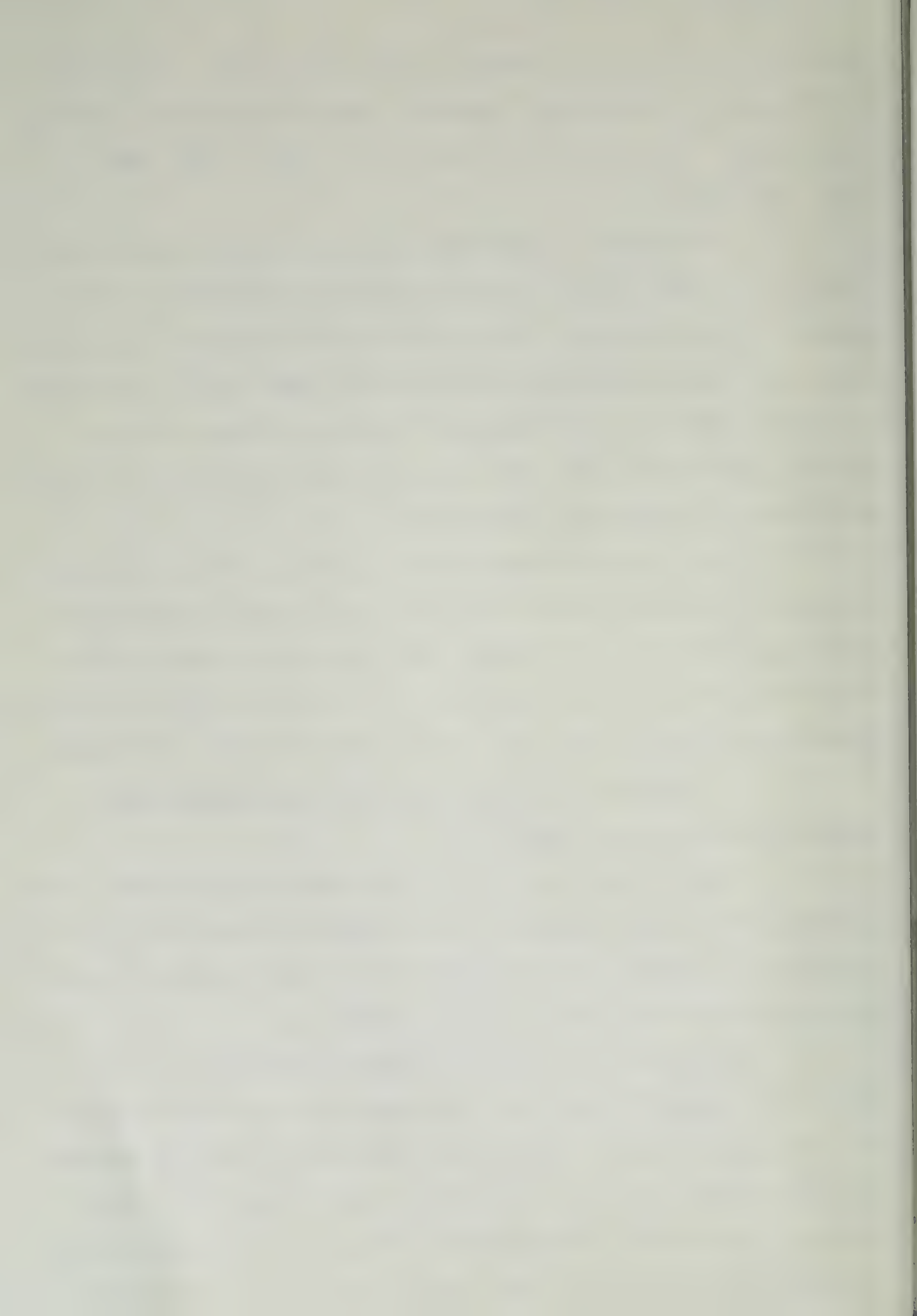
In addition, appellants offered to prove that appellees R.C.A. and G.E. and co-conspirator Motorola were also members of the Electric Industries Association ("E.I.A."), and that this trade association compiled the same type of statistical sales data collected from its members as does N.E.M.A. See Pl. Ex. Nos. 92, 93, 94, 174-183, 4119; Pl. Ex. for Id. Nos. 7 and 5068; Tr. 4809-4810, 6495-6496.

• And, as is the case with A.H.L.M.A., E.I.A. members reached an agreement upon a uniform advertising program that would apply to members' dealers, and required a dealer affidavit of advertising list prices as a condition to being granted advertising funds. (Pl. Ex. for Id. No. 5068; Tr. 4809-4810).

7. Evidence Of Continued Refusals To Deal With Manfree After August, 1960:

After Action No. 39,336 was commenced in August, 1960, appellants continued to make demands upon the appellee and co-conspirator vendors to be allowed to buy their leading brands of major appliances and television sets.

In October, 1961, U.S.E. discontinued the requirement of a membership card for admittance to its store premises. It informed various of the vendors refusing to sell to Manfree of this change in policy, by letters sent to each. In these letters, appellants repeated their requests to be permitted to purchase the subject products, noting that White Front Stores,



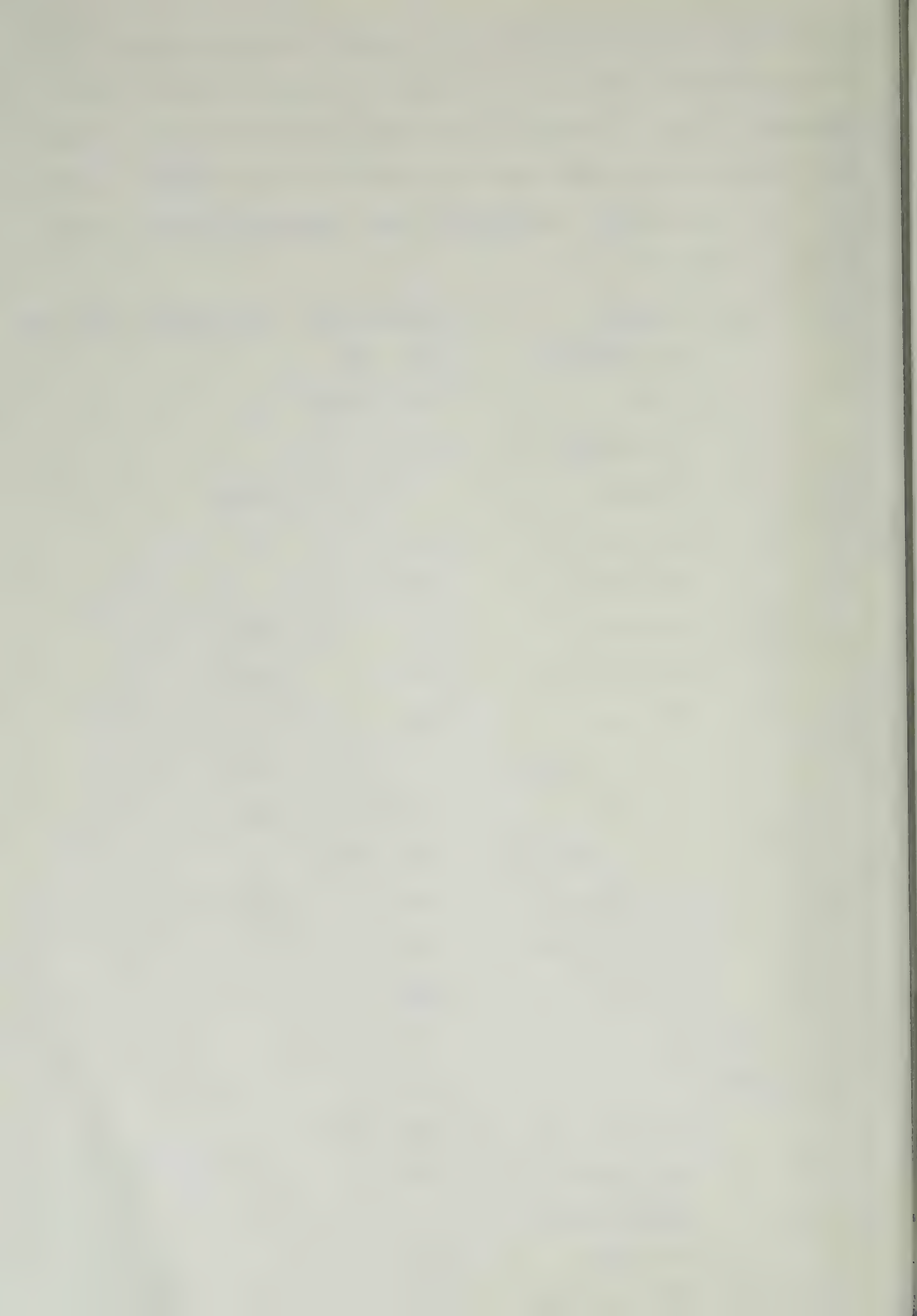
a discount store chain that had recently located outlets in the San Francisco Bay Area, was able to obtain many of these requested lines. Further letters requesting the right to buy such products were also sent to certain of the vendors in 1963.

Appellants' post-1960 letter requests appear in the record as follows:

1. <u>1961:</u>	<u>Vendor</u>	<u>Pl. Ex. No.</u>	<u>Pl. Ex. for Id. No.</u>
	Frigidaire	496, 497	
	G.E.	4274, 4276	
	Hotpoint	538	
	Maytag		4165
	R.C.A.	1692	
	Whirlpool	1716	
	Motorola		1761
	Borg-Warner	4038	1769
	Philco	4283	
	Westinghouse		1817
	Graybar	527, 4278	548
	A. H. Meyer Co.	1706, 4231	
	Lancaster	4285	1757, 1758
	Calif. Electric	1785	
	Basford	4282	

2. 1963:

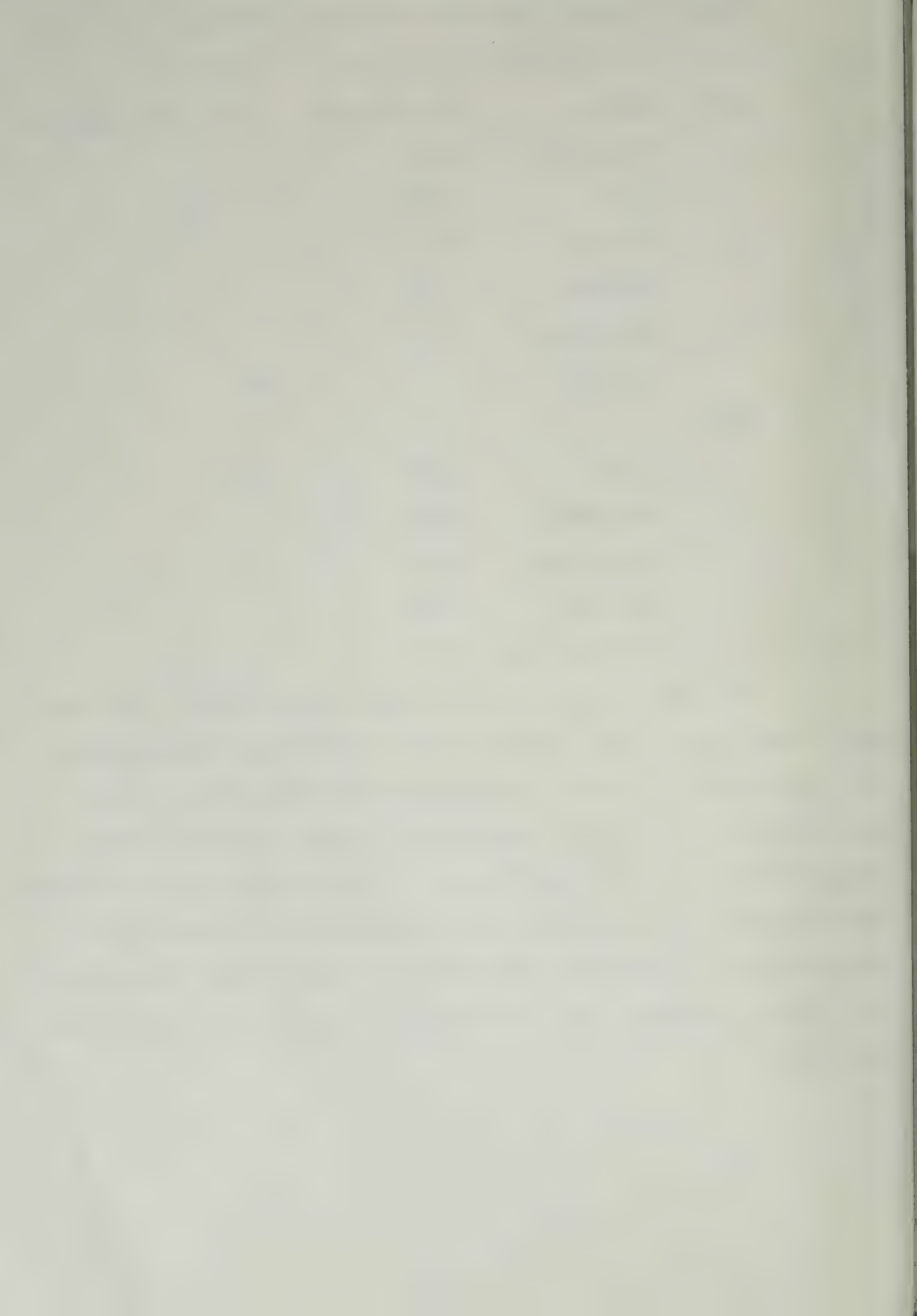
R.C.A.	1698, 1701	
Whirlpool	1722	
Norge Sales		1773
Motorola	4201	
Westinghouse	1818	



These requests were all uniformly refused. The refusals to deal are reflected in the record as follows:

1. <u>1961:</u>	<u>Vendor</u>	<u>Pl. Ex. No.</u>	<u>Pl. Ex. for Id. No.</u>
	Frigidaire	4270	
	R.C.A.	1693	
	Hotpoint	547	
	Whirlpool	1718	
	Borg-Warner	1771	
	Motorola		1762
2. <u>1963:</u>			
	R.C.A.	1684	1702
	Whirlpool	1721	
	Norge Sales	1775	
	Motorola	1763	
	Westinghouse	1819	

The 1963 request letters were occasioned by the opening of the White Front discount store in Oakland, California; its advertising in local newspapers showed that White Front was carrying G.E., R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets. By their replies, the appellee and co-conspirator vendors either continued to refuse to deal with Manfree, or referred appellants to their local distributor, who in each case was also continuing its refusal to deal with Manfree.



SUMMARY OF ARGUMENT

The fundamental issue in the trial of this case was whether or not an agreement or understanding existed, tacit or express, to boycott appellants. Such agreements "are seldom capable of proof by direct testimony and may be inferred from the things actually done....." Eastern States Retail Lumber Dealers' Assn. vs. United States, 234 U.S. 600, 611, 616 (1914). Evidence of refusals to deal by a group of competitors is admissible circumstantial evidence from which a trier of fact may infer agreement. Proof of the refusals to sell to Manfree among appellees and others, who were proven to have a common motive to support retail list pricing among the large, key retailers in the San Francisco retail market for major appliances and television sets, was sufficient evidence for appellants' case to go to the jury. Theatre Enterprises vs. Paramount Film D. Corp., 346 U.S., 537, 540, 541 (1953). In the face of such evidence, the jury alone, under our Constitutional system, determines what are the facts (and if denials of an agreement or combination by the defendants are true). Testimony that refusals to deal stemmed from an independent business decision, unrelated in any way to group action or agreement, is at most a defense to be weighed by the trier of fact. Such evidence does not permit a directed verdict, but is properly a case for jury determination. Continental Ore Corp. vs. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Standard Oil Co. of California vs. Moore, 251 F. 2d 188 (9th Cir. 1957);



Girardi vs. Gates Rubber Company Sales Division, Inc. 325 F. 2d 196 (9th Cir. 1963). The defendants' claims are not binding on the Court; their defenses are weighed by the trier of facts in the context of the particular market situation.

United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856, 1863 (1967).

Appellants' evidence of an agreement, tacit or express among the appellees and their co-conspirators to boycott appellants was substantial and convincing:

(1) Appellant Manfree requested and was denied the twelve leading brands of major appliances and television sets during the period 1959 to 1964, Norge, Philco Hotpoint, Maytag, Frigidaire, G.E., Whirlpool, R.C.A., Motorola, Westinghouse, Sylvania and Zenith.

(2) Appellant U.S.E. (as a landlord) was a discount store operation, and its lessee, Manfree, would not tag or advertise the subject products at the manufacturers' and distributors' list prices, as did the co-conspirator retailers competing with it in San Francisco.

(3) Each of the distributor defendants were shown to have a common motive to use list prices, and to require their retailers in the market to advertise at these prices by not allowing advertising credits unless they did so. The funds to support this scheme came largely from the defendant manufacturers of the products.

(4) All the manufacturer defendants worked close with Hale and the other retail store co-conspirators, as the



"key accounts" in the San Francisco market, and these retailers were supported by the manufacturers with special advertising funds. Discount store advertising, at "cut prices", threatened this controlled, non-competitive market.

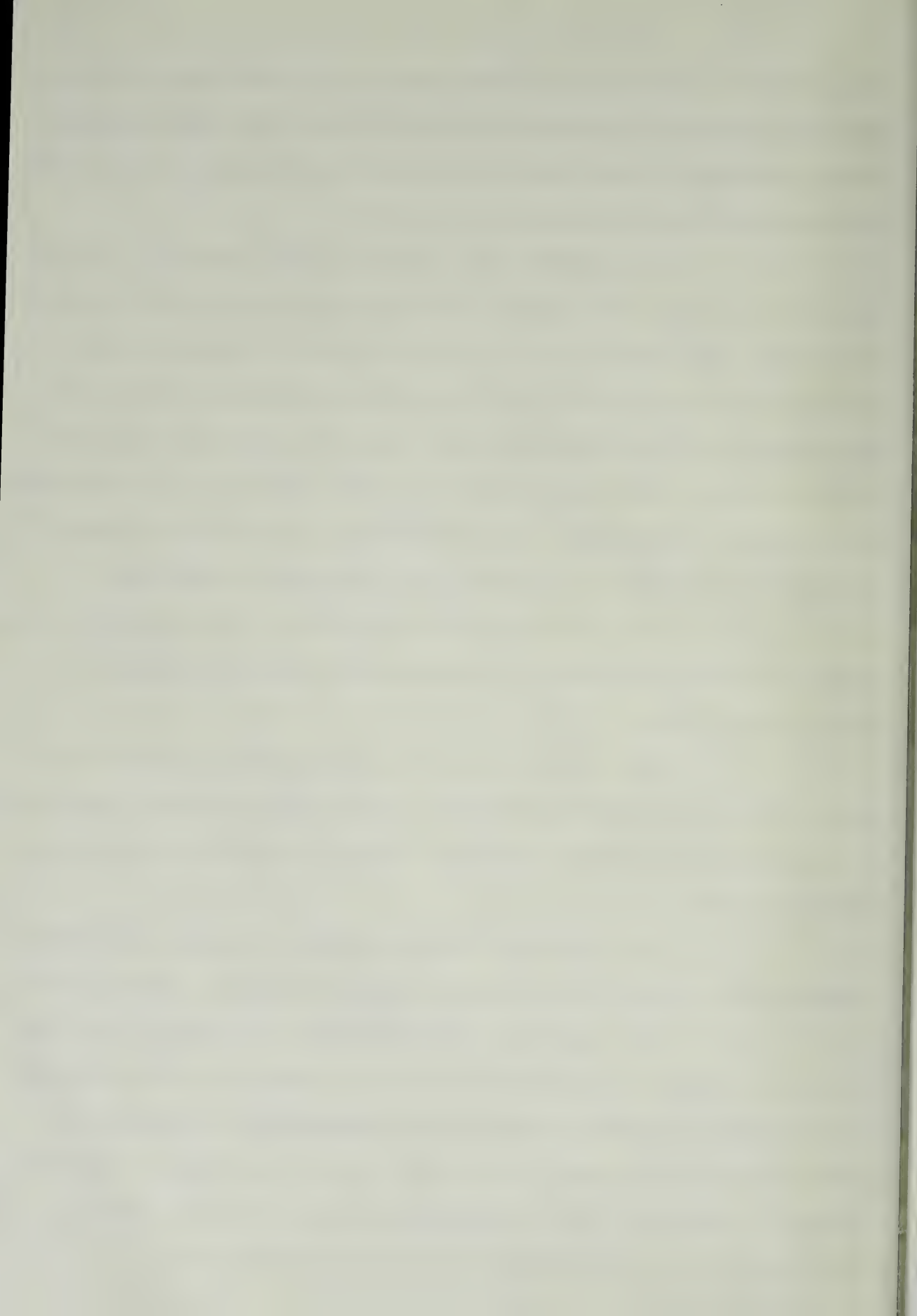
(5) Manfree was able to obtain certain lines of merchandise during the period 1957-1959 (Norge, Philco, Maytag, Hotpoint). At the time of the cancellation of these lines, Manfree's officers were told, by vendor representatives, that the reasons for such cancellations were (i) pressure upon the vendors not to sell to Manfree from Hale, or from the other large San Francisco retailers, or (ii) threats that if they sold to Manfree, they could not sell to such competing retailers.

(6) While Manfree carried the Hotpoint and Maytag lines, Hale and the other co-conspirator retailers refused to carry these lines.

(7) During the short time Manfree could obtain Norge and Philco major appliances, Hale refused to use advertising credits from vendors of these lines, or refused to pay past-due debits to them.

(8) Manfree's cancellation by Maytag was coincidental with a large \$11,000.00 purchase of Maytag goods by Hale.

(9) Manfree's cancellation by Graybar (Hotpoint distributor) was coincidental with that company's establishment of an advertising policy requiring its retailers to advertise at list price (Pl. Ex. Nos. 339, 340); and a San Francisco meeting called by Graybar, well attended by large retailers, where it was announced it would no longer sell to discount stores.



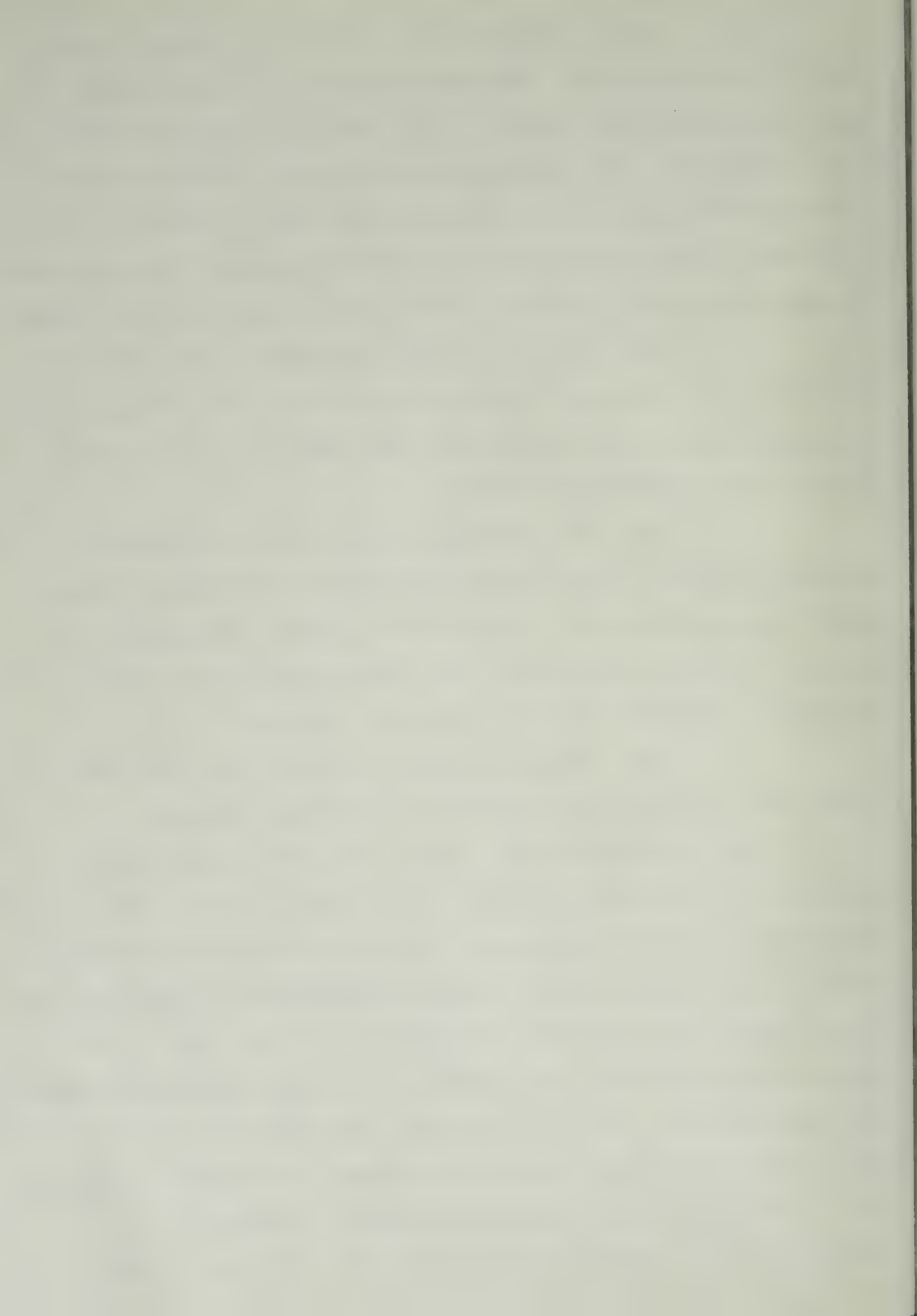
(10) The boycott of appellants extended beyond the San Francisco area. Manfree was unable to obtain Norge appliances from Norge Sales, or its Southern California distributor, (Graybar). After Manfree had obtained a carload of Norge appliances from Los Angeles, Norge Sales held a meeting with its California distributors concerning such shipments, which resulted in appellants being unable to obtain Norge goods from any source.

(11) Manfree could never obtain G.E., R.C.A., Whirlpool, or Frigidaire products because it was a discount store. Bona fide requests by Manfree for substantial orders to these vendors were repeatedly denied.

(12) The two San Francisco morning newspapers refused to accept U.S.E. advertising from 1957 through 1960 because the large retailer advertisers in those newspapers, such as Hale's, Macy's and others, put pressure on them to refuse such advertising (Borg-Warner Ex. No. 9024, stricken).

(13) Another discount store in San Francisco, "GET", was substantially boycotted by the same vendors.

The evidence further showed that the conspirator defendants met together in various trade associations. The appellee manufacturers of frigidaires and other major appliances worked together on a campaign to establish and maintain a nation-wide list price distribution system. (Pl. Ex. for Id. No. 431). Certain conspirator defendants met together in various Northern California and San Francisco trade associations. One of these groups to which the retailer defendants and most defendant distributors belonged, the Northern California Electrical Bureau, developed a local campaign requiring retailers to sign affidavits that



appliances were sold at suggested list price. (Pl. Ex. No. 2090). Another association, the Home Furnishing Advisory Committee of the San Francisco Better Business Bureau (whose members included Lachm Bros., Redlick, Sterling and Macy's) held meetings concerning the advertising of furniture and household appliances in the San Francisco newspapers during the period 1957 to 1960. One member co-conspirator, Sterling, approached the San Francisco News Call Bulletin to discuss the U.S.E. advertising it was carrying. The circumstances shown to be involved in this meeting would allow the jury to reasonably conclude that pressure was being applied to prevent U.S.E. from advertising in that newspaper, as well.

The defenses of independent business judgment in refusing to deal was, under this evidence, simply a jury question, and the Trial Court, it is respectfully urged, could not turn these defenses into a decision on the merits. Standard Oil Company of California v. Moore, 251 F. 2d 188 (9th Cir. 1957).

Even assuming that the evidence admitted was not substantial on the issue of the existence of a conspiracy to boycott, the record demands reversal of the judgment below because substantial evidence was excluded as to each appellee.

California Electric Supply Co.: The Court excluded the admissions of its Sales Manager, Mr. J. T. Valenson, that appellants had a million dollar conspiracy case, that he had been asked to give false testimony, and that his salesman handling the Manfree account, Mr. Muntain, had given false testimony in his deposition in the case. California Electric Supply sought to defend its refusal to deal at this deposition and during trial,

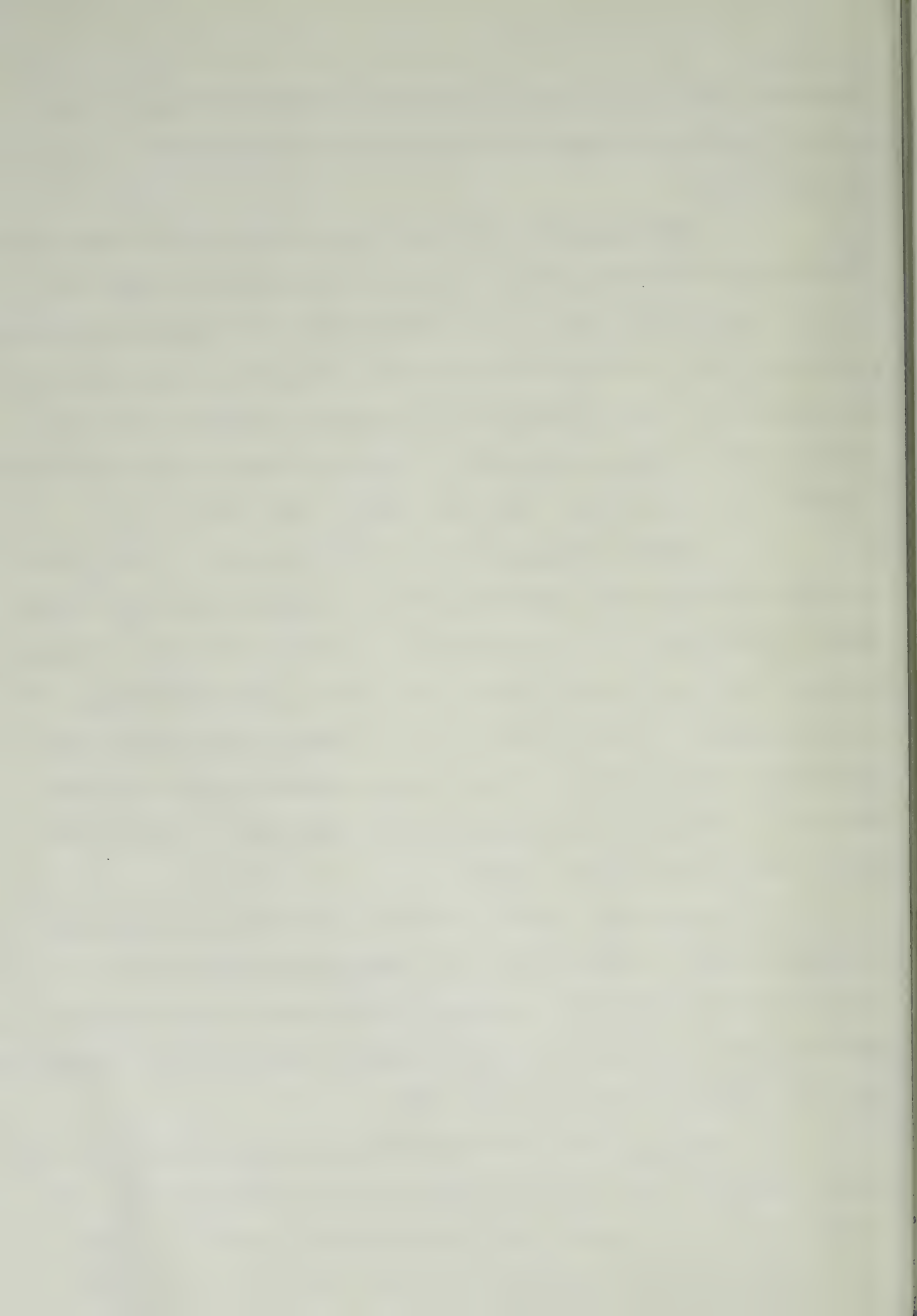
evidence admitted was to the contrary and these admissions were clearly admissible against this appellee, and against all the conspirators.

Borg-Warner: The Court first admitted and then struck Borg-Warner's Exhibit 9024, evidence of retailer pressure on a local newspaper to deny U.S.E. advertising. It further excluded evidence from Borg-Warner's files that the appellee manufactures of frigidaires were attempting to establish a fixed and rigid distribution system in the United States, based in part upon maintenance of list price. (Pl. Ex. for Id. No. 431).

General Electric: The Court excluded G. E.'s intra-office correspondence admitting that its dealers did not engage in price competition in San Francisco, and that sales to a discount store in the area would disrupt the retail price structure. This correspondence further showed that the major appliance manufacturers had knowledge of the brands carried by the discount stores in the San Francisco area. (Pl. Ex. for Id. Nos. 5032, 5033, 5034, 5044, 5045 - 5047).

Hotpoint: As to Hotpoint, the Court excluded the testimony from Graybar's District Appliance Manager that the consent of Hotpoint was necessary before Graybar would cease selling Hotpoint appliances to discount stores in San Francisco. (Pl. Ex. for Id. Nos. 5112 and 5113).

R.C.A.: The Court rejected correspondence and testimony showing R.C.A.'s involvement with the maintenance of list prices in San Francisco. The Court further excluded evidence that R.C.A. required retailers to sign affidavits concerning



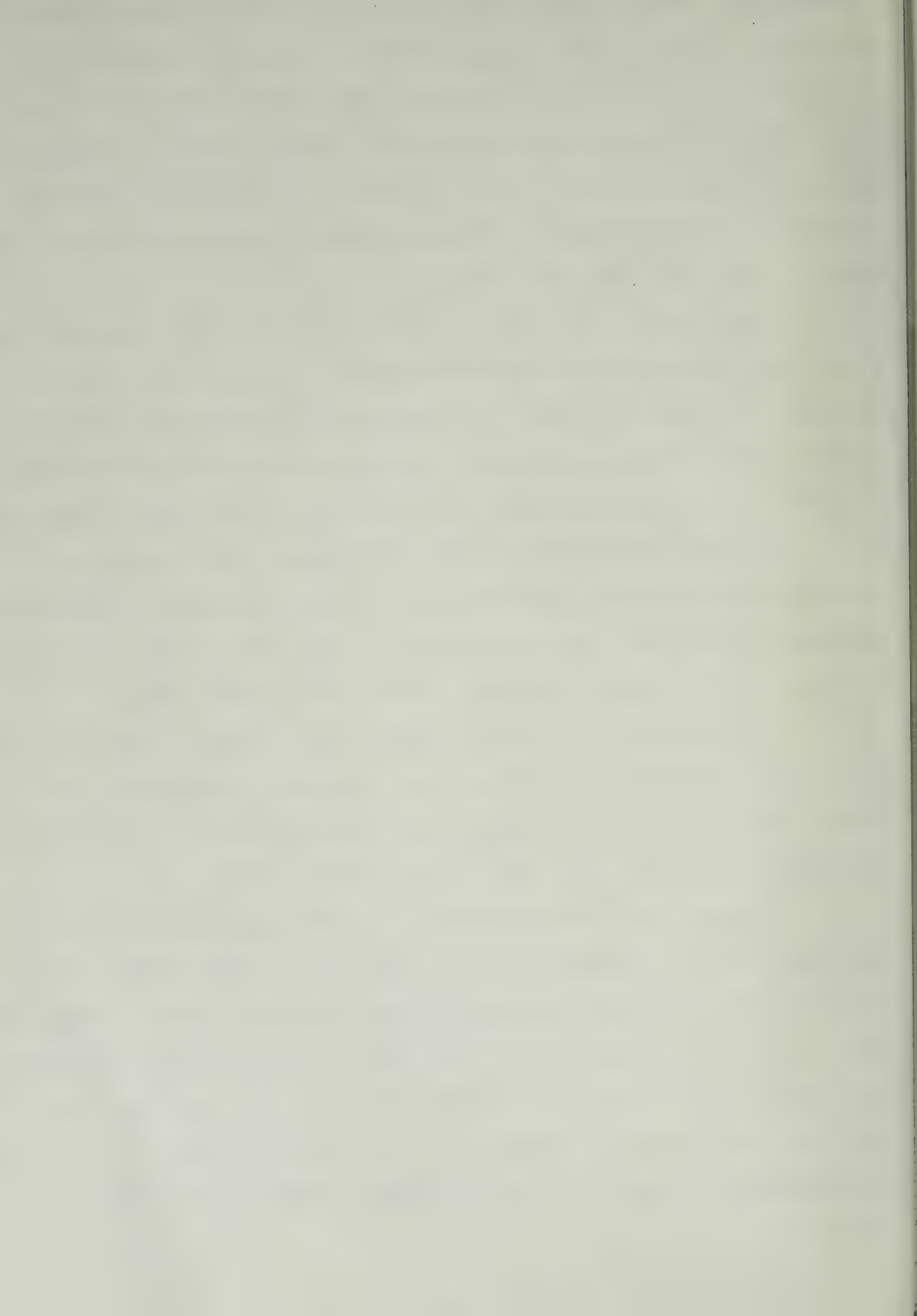
"comparative" retail price advertising in order to obtain advertising funds. (Pl. Ex. for Id. No. 5068). The Court rejected the testimony of R.C.A.'s Vice President, Mr. Saxon, that it did not engage in retail price competition with other television manufacturers. It also failed to give any probative weight to substantiated evidence of business contacts between R.C.A.'s representatives and Hale's. (Pl. Ex. Nos. 349, 350).

Whirlpool: The Court failed to consider the evidence that R.C.A. and Whirlpool had common directors. Instead, the Court accepted the argument that it is conjectural to imagine a manufacturer and distributor of washers and dryers conspiring with manufacturers of television sets, and stated that the product lines of R.C.A. are entirely different from the product line of Maytag. It also failed to give probative value to the evidence of numerous meetings between Whirlpool and Hale's. (Id., Tr. 5061). (See Pl. Ex. Nos. 685A-C, 686A-E, 687A-C, 689A-B, 665, 4236, 4237.)

Frigidaire: The Court rejected the evidence upon which the jury could determine that Frigidaire continued to maintain list prices after 1961 when it discontinued printing price sheets containing list prices. (Pl. Ex. for Id. 4170, 4178).

Maytag: The Court refused to allow appellants to prove that the Regional Manager of Maytag West Coast told Manfree that it had changed its sales policy in San Francisco, was no longer going to sell to discount stores, and thus could not sell to Manfree any longer. This ruling completely rejected the principle that a plaintiff may prove the reason for the refusal to deal.

Continental Ore Corp. vs. Union Carbide & Carbon Corp. 370 U.S. 690 (1962).

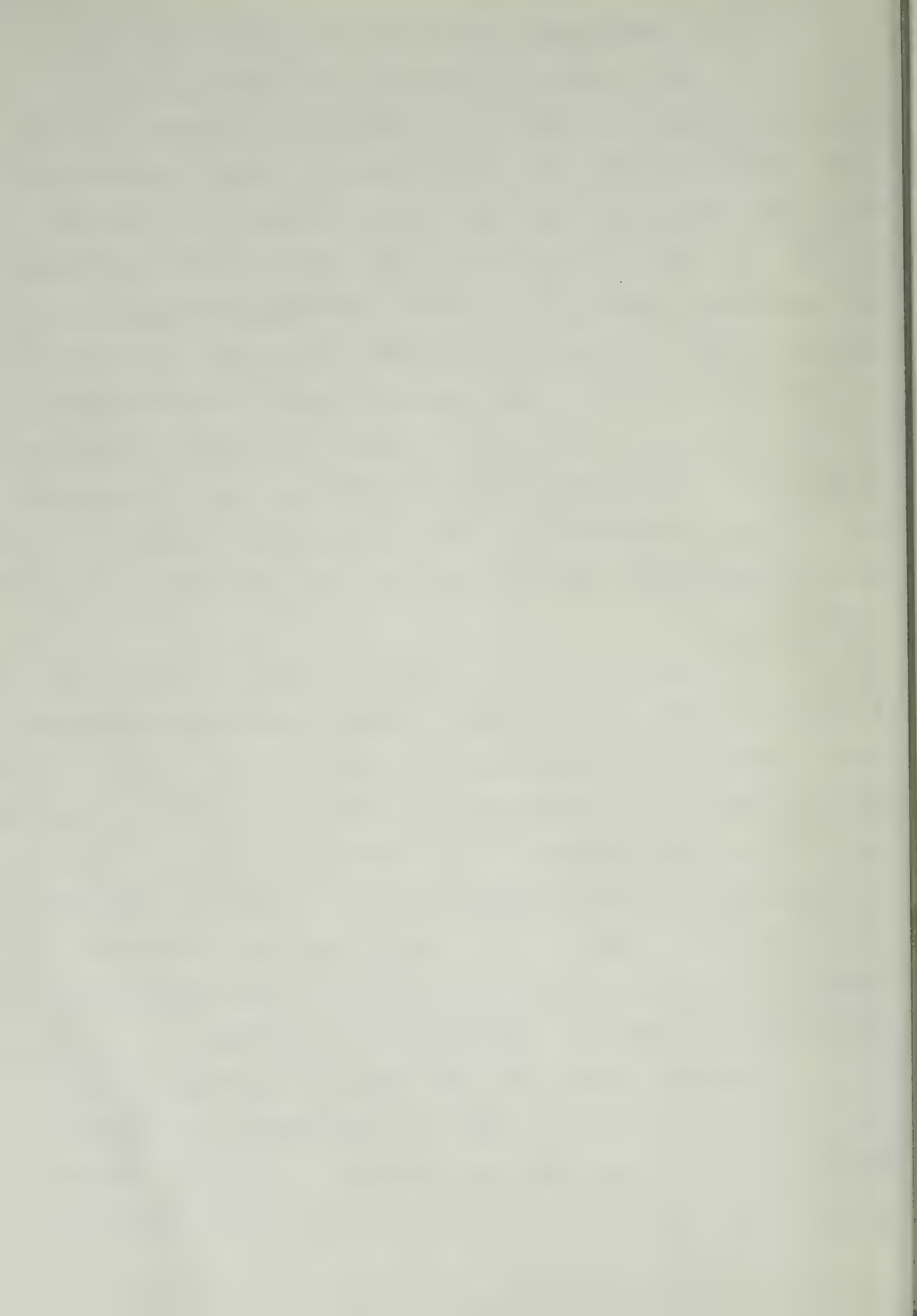


Other substantial relevant evidence was rejected:

The Court refused to allow Mr. Vern Brown, District Appliance Manager for Graybar, to testify that Graybar knew the issue in San Francisco was one of having to choose between selling to the large department and furniture stores, or discount stores. The basis of this ruling that appellants had not detailed the subject matter of Mr. Brown's testimony sufficiently in pretrial papers, is urged as erroneous. The Court also refused to allow the testimony of the District Manager of Westinghouse to the same effect. The Court's ruling with respect to Westinghouse, that such testimony would be based upon opinion and hearsay is urged as erroneous, as the evidence itself showed that such vendors based their sales policies upon such information from the field.

The deposition of Mr. Alpine, U.S.E.'s president who died before trial, was rejected, although defendants had substantially completed the deposition. The basis of the ruling was that the defendants were not allowed to complete the deposition because they did not have available at the deposition memoranda of his conversation with vendor representatives, prepared by Mr. Alpine at his attorney's request. The record shows that defendants delayed an unreasonable period of time in attempting to obtain these reports, which were claimed to be privileged.

Evidence showing that the National Electrical Manufacturers' Association and the American Home Laundry Manufacturers' Association worked together, was rejected. Yet, this evidence showed a clear common purpose and motive to support agreements



which prevented challenges to their controlled market. (See United States vs. General Motors Corp. 384 U.S. 127(1966).)

The Court rejected the studies of appellants' accountant, showing that the retail defendants tagged the subject products at list price. (Pl. Ex. for Id. Nos. 1561 - 1578 (Hale's); 1579 - 1681 (Lachman Bros.); and 1560 (Redlick).)

Evidence offered by appellants of the conspiracy to boycott Klor's, Inc., another local retailer, by appellees G.E., R.C.A., and Whirlpool, prior to January, 1967, was admissible evidence under the authority of Standard Oil Co. of California vs. Moore, 251 F.2d 188 (9th Cir. 1957). (See Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).)

Even assuming the evidence of appellants was not substantial on the conspiracy issue, the record requires reversal of the judgment below because appellants should have been permitted to present their evidence and have a jury determination on the issue of refusals to deal, based on maintaining vertical price agreements. This theory of appellants' case was rejected by the Court, despite its assertion in the complaints and the pretrial papers. A plaintiff is entitled to obtain damages based upon all violations of antitrust laws which injure them. (Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra.)

Further, in accepting evidence, the Court failed to apply the oral declarations of agents of the distributors against the factory defendants, and refused to allow appellants the right to treat witness representatives of conspirators as hostile and

adverse. Yet the Court did make the written evidence introduced as to one conspirator, applicable to all other conspirators. (Tr. 6854).

The Court dismissed appellee Norge Sales, who was joined as a party in the second complaint. This was erroneous, as appellants could always add a conspirator as a party, who would be liable for damages committed, pursuant to the conspiracy, within four years of its joinder as a party defendant.

Appellants' pre-trial discovery was prejudicially limited by the Court in not allowing production of all intra-office reports of appellees concerning the appellants, and by not allowing them to develop the existence of, or admissibility of, appellees' witness, interview statements or reports.

The Court also committed reversible error in the allowance of costs by taxing appellants with the costs of two copies of the daily transcript; costs of copies of the depositions; costs of pretrial transcripts, and certain other costs.

ARGUMENT

I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
IN DIRECTING A VERDICT FOR EACH DEFENDANT,
AND IN DISMISSING THE COMPLAINTS AS TO ALL
OF THE APPELLEES

(Specification of Errors I)

- A. The Judgment For Appellees Is Not Proper, As It Is Based Upon The Failure Of The Court To Give Appellants' Evidence The Benefit Of All Inferences It Fairly Supports (Even Though Contrary Inferences Might Reasonably Be Drawn), And In The Light Most Favorable To Appellants. This Is Especially True As The Basic Facts Are Largely Undisputed, And Consist Of Direct Evidence Showing A Common Boycott Of Appellants:

1. Appellants' direct evidence showed the boycotting of appellants by the vendor appellees and co-conspirators, because Manfree's pricing policy did not follow list prices, and because appellants were a discount store operation which threatened the San Francisco retail market controlled by the appellees and their co-conspirators.

The Seventh Amendment of the United States Constitution guarantees appellants a trial by jury; it entitles them to a jury determination of their claim that their evidence would show that it was more likely true than not, that appellees and their co-conspirators boycotted appellants in violation of the antitrust laws. A Federal District Court may only take a case away from a jury when it can be said that reasonable men, exercising an unprejudiced judgment, would draw opposite conclusions from the facts presented. Story Parchment Co. vs. Patterson Parchment Paper Co., 282 U.S. 555, 560, 566-567 (1931); Continental Ore Co. vs. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962); Girardi vs. Gates Rubber Company

Sales Division, Inc., 325 F.2d 196, 200, 206, 204 (9th Cir. 1963).

F.R.C.P. Rules 41(b) and 50 cannot be properly applied when substantial evidence introduced shows a concerted or group refusal to deal, among competitors. United States vs. General Motors Corp., 384 U.S. 127, 141-143 (1966); Klor's Inc. vs. Broadway-Hale Stores, Inc., 359 U.S. 207, 209-211 (1959); Theatre Enterprises vs. Paramount Film D. Corp., 346 U.S. 537 (1953). As stated by the Supreme Court in Theatre Enterprises, supra, at pp. 540-541:

"The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." (Citing cases)

Refusals to deal have persuasive evidentiary significance in boycott cases, and this Court has consistently held that refusals to deal are to be examined in their market context. Flinkote Company vs. Lysfjord, 246 F.2d 368, 375-376 (9th Cir. 1957); Standard Oil Co. of California vs. Moore, 251 F.2d 188, 205-210 (9th Cir. 1957); Sunkist Growers, Inc. vs. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 10-18 (9th Cir. 1962); Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 199 (9th Cir. 1963). The instant appeal involves an antitrust action in which appellants have presented substantial evidence of a concerted refusal to deal. The appellees attempted to justify the common refusals to deal with Manfree as being decisions solely based upon individual business judgment. However, this but presents the classic

factual question of what is the truth of the matter, which goes to a jury for its decision upon credibility. See Girardi vs. Gates Rubber Company Sales Division, Inc., supra, at pp. 200, 202-203; Story Parchment Co. vs. Patterson Parchment Paper Co., supra, at p. 567. At the time of the refusals to deal (or the cancellation of Manfree's few franchises), which completely isolated Manfree from the sources of supply, officers of appellants were expressly told upon numerous occasions by various vendor representatives, that the particular vendor could not (continue to) supply Manfree, because of pressure from co-conspirator Hale; or that they could not sell to the downtown or large department stores and to Manfree at the same time; or because of so-called "dealer structure" (the existing dealers would not countenance sales to competing discount stores).

The jury is the only fact-finding body to determine the credibility of the testimony of appellants' witnesses Bernard Freeman, Marvin Boyd, Vern Brown, Joseph Mittelman, Bert Green, and Victor Honig. These witnesses testified or produced evidence proving that a group boycott existed against appellants. A jury decision for appellants, based on the testimony of these witnesses and appellants' documentary evidence admitted in evidence, clearly would be adequately supported by substantial evidence. The Court below however, it is respectfully urged, adopted the same erroneous course as did the trial courts in the cases of General Motors (supra) and Lessig vs. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), cert. den. 377 U.S. 993 (1964): It failed to apply proper legal standards to the admitted refusals to deal with appellants, and to the

admissions by representatives of appellees and co-conspirators that the vendors of the products involved could not sell to discount stores in San Francisco County because of illegal pressures from the retail store conspirators who were competitors of Manfree. It refused to give proper legal significance to proven refusals to deal being utilized as a means of enforcing illegal price control. Appellants' evidence showed as follows:

a. The suppliers of twelve leading brands of major appliances and television sets refused to deal with Manfree. (Supra, pages 41-52, 54-62, 67-69, 74-76).

b. Some vendors did sell to Manfree for periods of time, but subsequently they refused to continue to deal with appellants. (Supra, pages 43-47).

c. At the time of these cancellations, sales representatives of various vendors told officers of Manfree that such actions were necessary because of great pressure from their "downtown" retailers, or because of instructions from management to change pre-existing sales policies to now exclude discount stores:

(1) Co-conspirator Lancaster's salesman, Mr. Jack Mitchell, told Mr. Freeman of Manfree in 1957 that Lancaster had been subjected to pressure from Hale representatives not to sell to Manfree; that his company held a meeting to discuss the situation, deciding that under such circumstances Lancaster would not sell to Manfree any longer. (Supra, page 43; Tr. 5808-5809).

(2) California Electric's sales

representative, Mr. John Muntain, told Mr. Freeman in about September, 1958, that his company ceased selling Philco appliances to Manfree because of pressure from other San Francisco retail stores not to continue to do so. (Tr. 5736-5737).

(3) Co-conspirator Graybar's representative, Mr. W. H. Mayben, told Mr. Freeman in October, 1958, that Graybar would be unable to sell to department or other stores, so long as it was selling to discount stores, and that therefore Graybar would no longer sell Hotpoint appliances to Manfree (Tr. 5797-5798).

(4) Manfree's franchise was cancelled by Maytag West Coast on March 10, 1959, immediately following a period in which Hale would not buy or advertise Maytag products. Almost coincidental with Manfree's cancellation, Maytag sold \$11,000.00 in Maytag appliances to Hale. (Supra, pages 46-47; see Pl. Ex. Nos. 639 and 640).

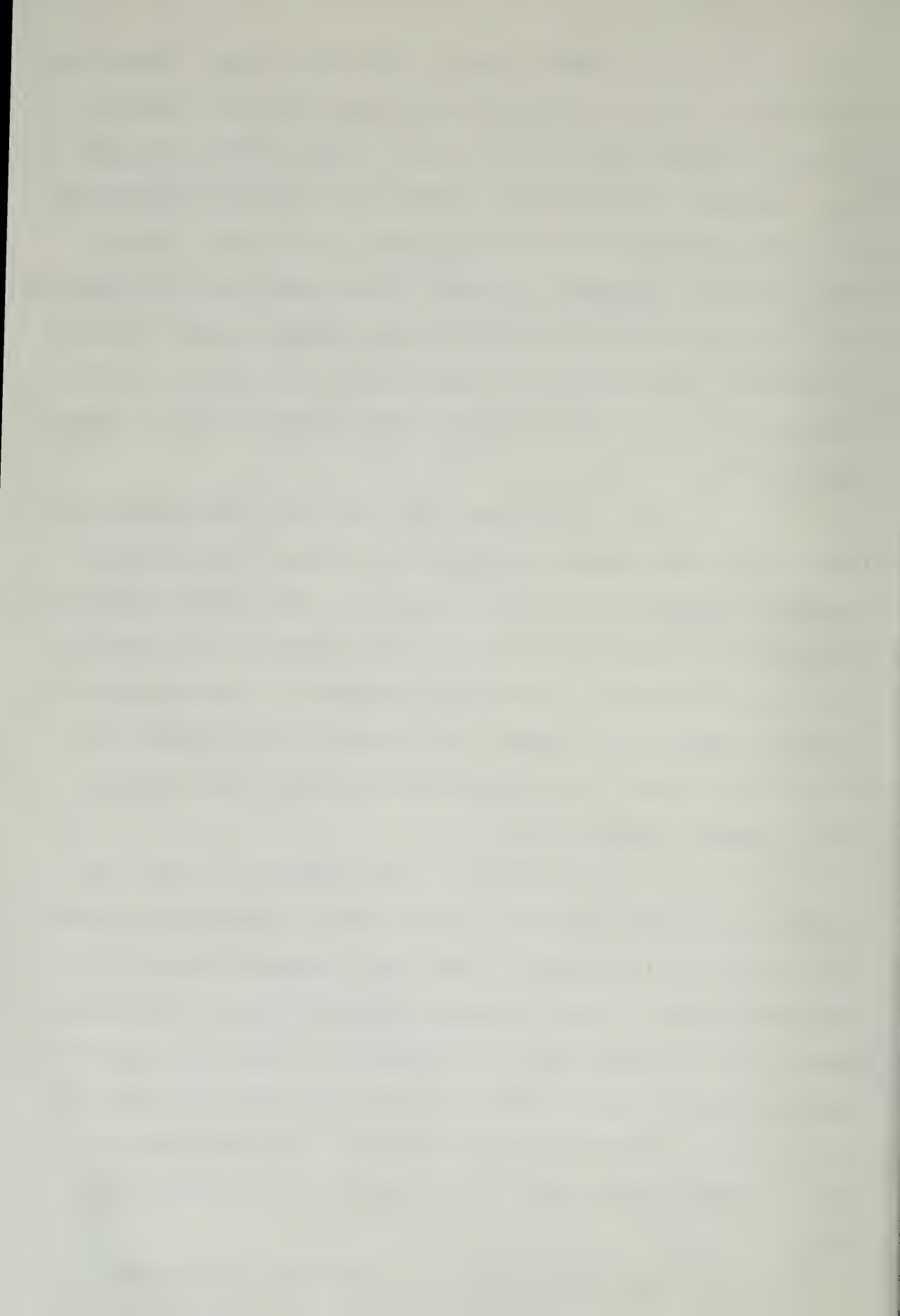
(5) Graybar's Los Angeles outlet refused to continue to transship Norge appliances to Manfree, because Borg-Warner and Lancaster requested it not to sell in Lancaster's "territory". Borg-Warner's sales arm, appellee Norge Sales, had fined Graybar for prior transshipments, and refused to sell its appliances to U.E.S.'s buying agent in Los Angeles, Mr. Bert Green. (Supra, pages 49-52). At the time of this action, Mr. Bonnet, an officer of Graybar in Los Angeles, told Mr. Green that he had just been told by Lancaster, during a telephone call, that the latter would not sell to Manfree, because it did not want to "jeopardize a million dollar business" with Hale. (Supra, pages 50-51; Tr. 5509).

d. Seven lines of television sets, comprising virtually all of the leading brands, were denied to Manfree during the period 1957 to 1964, i.e., R.C.A.-Victor, Philco, G.E., Motorola, Westinghouse, Zenith, and Sylvania (1958-1963). The leading brands of major appliances, i.e., G.E., Philco, Norge, Maytag, Whirlpool, Hotpoint, Frigidaire, and Westinghouse, were denied to Manfree during the same period, except for limited periods when several of these brands were sold to appellant on a "no-name - no price" advertising basis only. (Supra, pages 42-44).

e. In June and July of 1960, the vendor appellees and co-conspirators all received letters from Manfree urgently requesting the right to purchase the lines they sold, but they uniformly refused to deal with appellant in spite of what was a reasonable request that Manfree be franchised and allowed to carry such lines. This uniform and unbroken common refusal to deal by such vendors continued until August, 1964. (Supra, pages 74-76).

f. The companies that refused to deal with Manfree, when asked to do so could offer no convincing reasons for their refusals to deal. They only claimed that such decisions were based on some ethereal, general "policy" grounds. Maytag and California Electric attempted to show more specific reasons; however, such "reasons" once again only presented a valid issue of "who(what) do you believe" for the trier of fact. (Supra, pages 47-49, 54-62; see Tr. 3375-3379; 3958-3971).

g. Each appellee manufacturer admittedly

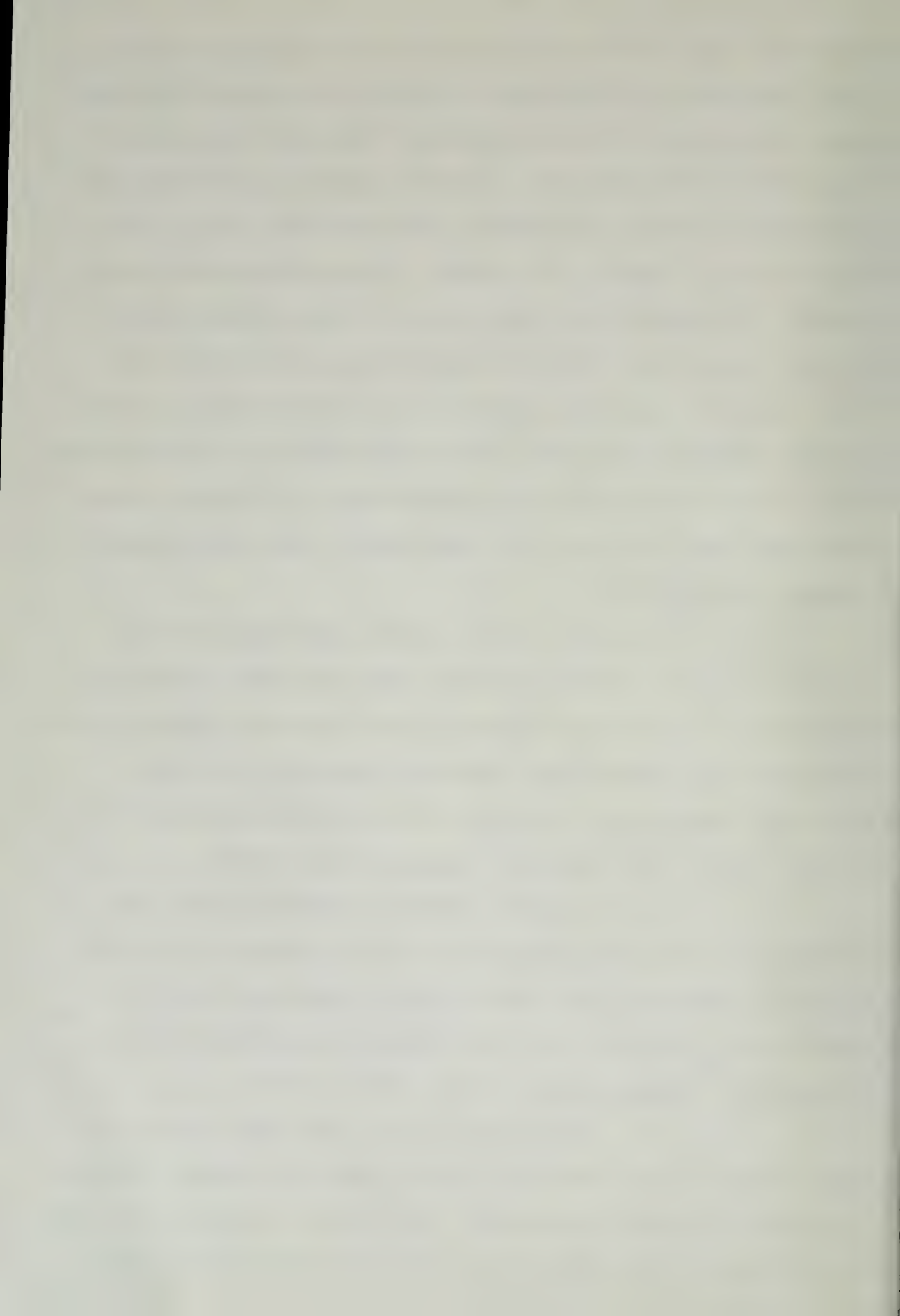


maintained list prices as of the time of the filing of the first complaint, and allocated millions of dollars for newspaper advertising of their products. They and their San Francisco distributors had a common purpose to maintain the advertising of major appliances and television sets in the market area at retail list prices: The manufacturers established list prices which were given to their distributors, and the distributors then published list price sheets for their retailer customers based on the manufacturer's prices; and the distributors based advertising credits to retailers on their adherence to list price advertising, a practice which must have been known to, and approved by, the manufacturers. (Supra, pages 28-39).

h. Each of the vendor appellees and co-conspirators had common knowledge that the large furniture, department or appliance stores in San Francisco controlled the advertising of these major consumer products in the San Francisco newspapers, and that such retailers advertised based on the vendors' list prices. (Supra, pages 30-32).

i. U.S.E.'s repeated requests to the two morning San Francisco newspapers to be allowed to advertise in their newspapers were denied, at a time when the co-conspirator retailers were the dominant advertisers in such newspapers. (Supra, pages 43-44, 52-54, 69-71).

j. Manfree (or U.S.E.) was not the only discount store in San Francisco County unable to obtain the leading brands of such merchandise. The other discount store then in existence in San Francisco, "GET" (Lakeshore Furniture),



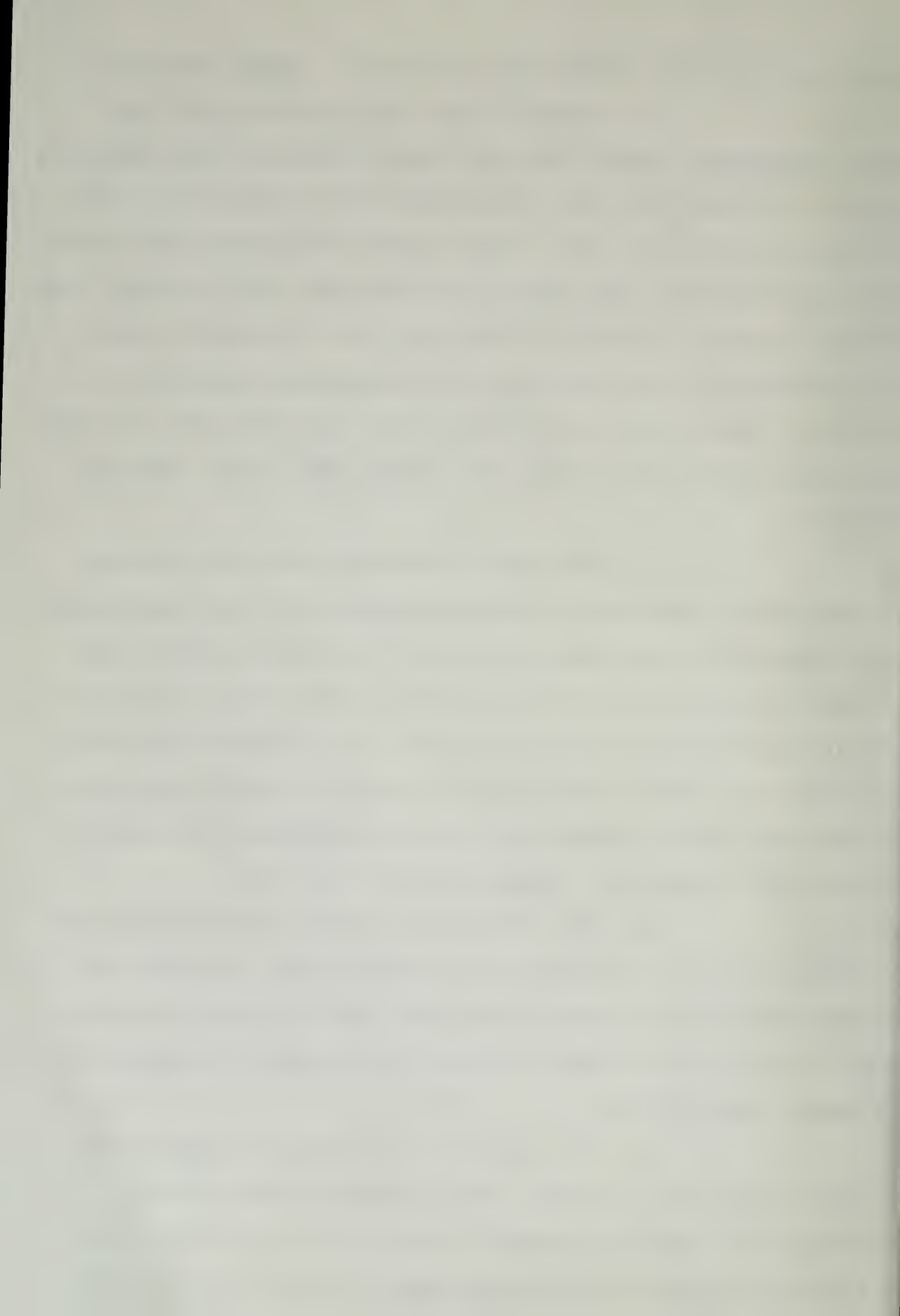
was also unable to obtain such products. (Supra, page 71).

k. However, while appellants and GET, in San Francisco, (where the retail store defendants had their key stores and were key city advertisers) were subjected to the boycott shown here, some of the vendor conspirators were readily selling major appliances and television sets to other "discount stores", situated in San Jose, and in Oakland (after Hale closed its San Francisco appliance store operations in 1963). (See P. Ex. No. 5077(A-D); Tr. 3199-3202; Pl. Ex. for Id. Nos. 4079, 4080, 4082, 4083, 4084, 4085, 4108, 4266 and 5052)

l. Existence of special and discriminating terms in the purchase of, and advertising of, major appliances and television sets was established, by direct evidence, between such vendors and Hale, and four other local retailers of major appliance and television sets. They received the bulk of "special" advertising dollars from such vendors and therefore were the key advertisers of such products in the San Francisco newspapers. (Supra, pages 37-41, 69).

m. The officers and other representatives of the appellees and co-conspirator distributors, and Hale and other major San Francisco retailers, met and worked together as a group in San Francisco County in a number of enterprises. (Supra, pages 62-64).

n. Just prior to the filing of appellants' first complaint in August, 1960 a representative of co-conspirator Sterling arranged a meeting with an officer of the San Francisco News Call Bulletin to protest about U.S.E.



being able to advertise in that paper. Lachman Bros. refused to advertise in the News Call Bulletin because it allowed U.S.E. to advertise. Hale had limited its advertising in this paper in 1959. (Supra, pages 70-71).

B. The Court Refused To Apply Well-Established Legal Principles Concerning Evidence Of Concert Of Action By Those Accused Of Unreasonable Restraints Of Trade, To The Facts Of This Case:

1. It is respectfully submitted that the decision of the District Court is in clear conflict with four basic, well-established principles of antitrust boycott law which compel the submission of this case to a jury, as follows:

a. The proof of parallel and common refusals to deal by competitors against one qualified to compete requires the submittal of the evidence of the refusals to deal to the jury, for its determination of whether or not there existed a concert of action. An express agreement to refuse to deal is not required. Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963) at 200 (see authorities cited there in footnote 9); United States vs. General Motors Corp., 384 U.S. 127, 142-143 (1966). Liability under the antitrust laws is based on the effect of restraints on the market place, and the showing here was that Manfree was completely excluded from the major appliance and television retail market by appellees. United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856, 1863 (1967); Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 221 (1939); American Tobacco Co. vs. United States, 328 U.S. 781 (1946); Theatre Enterprises vs. Paramount Film D. Corp., supra, at 540-541. This Court

stated, in Standard Oil Co. of California vs. Moore, supra, at 210-211:

"Part of the evidence, as previously noted, concerned asserted instances of parallel action knowingly taken, rather than actual contracts and communications between appellants. Consciously parallel business behavior in matters touching prices and competition does not itself constitute a Sherman Act offense. It is, however, admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters. The probative value of such evidence is to be determined by the trier of the facts. Theatre Enterprises, Inc. vs. Paramount Film Distributing Corp., 346 U.S. 537, 540-541, 74 S.Ct. 257, 98 L.Ed. 273." (Emphasis added.)

b. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which if carried out, is in restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act. Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 226-227 (1939); United States vs. General Motors Corp., 384 U.S. 127, 142-145 (1966).

c. Uniformity in refusing to sell, as a matter of policy, to a type of operation such as a "discount" store, forms the basis of permissible inference of joint action. Milgram vs. Loew's, Inc., 192 F.2d 579, 583 (3rd Cir. 1951).

d. Circumstantial evidence of concert of action is sufficient to overcome testimony by interested or biased witnesses denying the existence of an agreement. Such circumstantial evidence requires that the facts be submitted to the trier of fact for decision. This is especially the

case when those witnesses offering the contrary direct evidence, have been impeached. Girardi vs. Gates Rubber Co. Sales Division, Inc. 325 F.2d 196, 202-203 (9th Cir. 1963).

This Court stated in the Girardi case, at page 202:

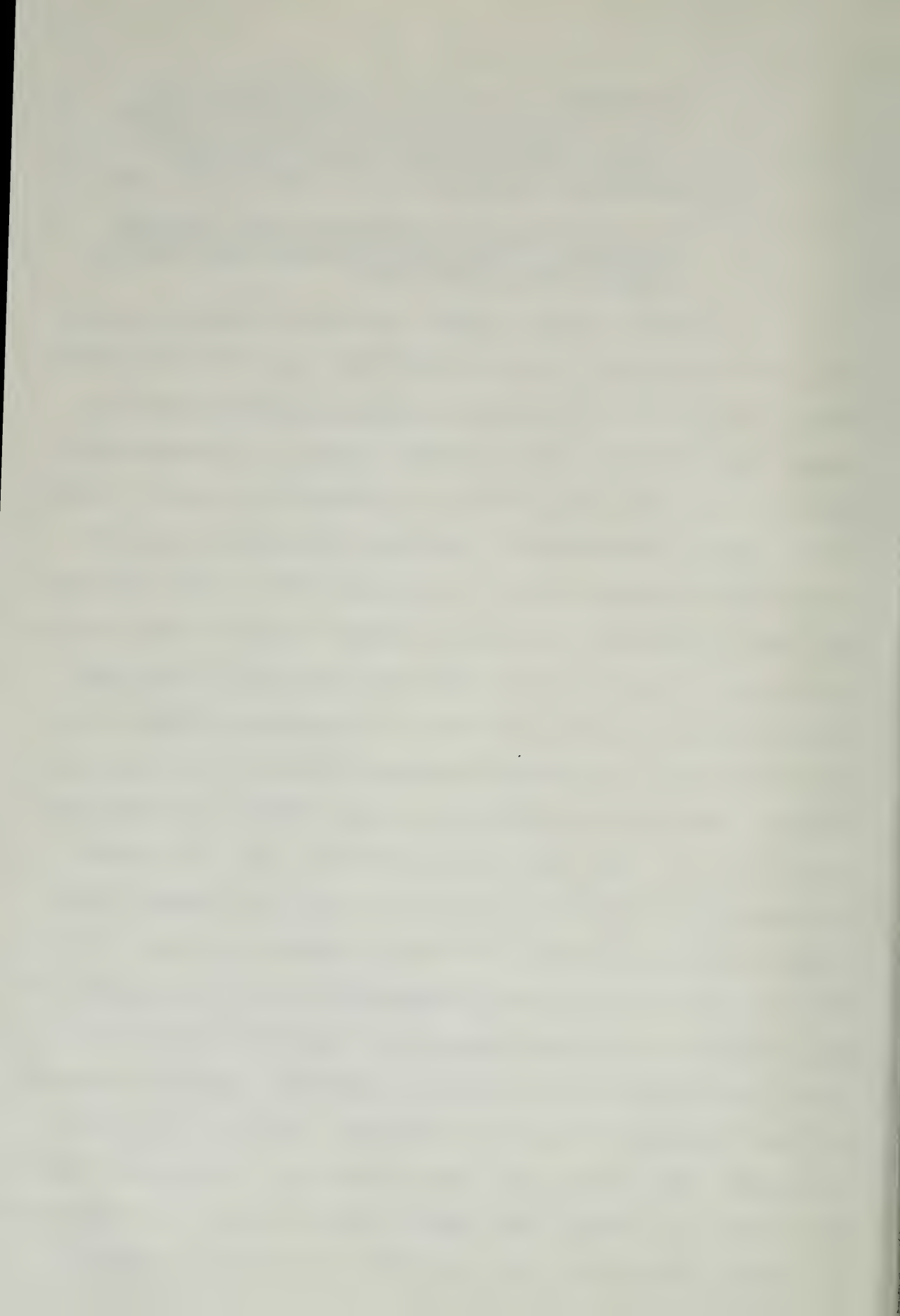
"It is plain that the jury were not obliged to accept as true the testimony last quoted or Oranges' assertion that he neither asked that Gates do something about Girardi's price cutting nor requested them to cancel Girardi's contracts. This is particularly true in view of Oranges' interest. If, as they might well do, the jury were to discount as untrue these assertions, the remaining evidence is sufficient to support an inference that Oranges did just the opposite--that he did suggest and request that Gates take the action which it did against Girardi."

The failure to apply the law of conspiracy summarized above to virtually undisputed facts, has had the demonstrated effect of allowing appellee and co-conspirator vendors to boycott discount stores in San Francisco. Discount stores have achieved their prominence in the retail merchandising field as "price-cutters," and thereby the obvious purpose of the boycott was to prevent price competition from discount stores. Such a boycott is clearly a means of enforcing price fixing at the retail level. This type of judicial failure was the subject of reversal in United States vs. General Motors Corp., supra. It is respectfully submitted that the Trial Court here committed the same type of clear error in non-suiting the appellants, as did the trial court in the General Motors case.

UNIFORMITY OF ACTION IN REFUSING TO SELL TO AN OTHERWISE SUCCESSFUL DISCOUNT STORE, UNDER CIRCUMSTANCES FROM WHICH THE TRIER OF FACT CAN REASONABLY INFER AGREEMENT, REQUIRES SUBMISSION OF THE CASE TO THE JURY

A. The Appellees Who Manufacture The Products Involved In This Case Admitted Their Refusal To Deal With Appellants:

As to the first claimed erroneous refusal to apply the law to the facts, it is respectfully urged that the decision of this Circuit in Standard Oil Co. of California vs. Moore, 251 F.2d 188 (9th Cir. 1957), held, on fundamentally similar facts, that the showing of refusals to deal by competitors, and of circumstantial evidence indicating that such vendors had a common motive to restrain trade, was sufficient to allow a plaintiff to recover judgment against those parties so refusing to sell to it. The first portion of the Moore opinion held that mere assertions by employees of defendants that there were "independent business reasons" for the refusal to deal, were not sufficient to justify taking the case away from the jury. (Id. at p. 206, 210-211). Yet, throughout the opinion of the Court below, there clearly appears a reliance upon the testimony of those witnesses who were, or had been at the time of the acts complained of, on the payrolls of the vendors of major appliances and television sets, to the effect that they were exercising individual business judgment in their refusals to sell to appellees: R.C.A., (R. 1923, 1925-1926); Whirlpool, (R. 1929; 1932-1933); Maytag and Maytag West Coast, (R. 1936, 1937-1938); General Motors and Frigidaire, (R. 1942, 1944-1945); G.E., (R. 1952, 1953-1955); Hotpoint,

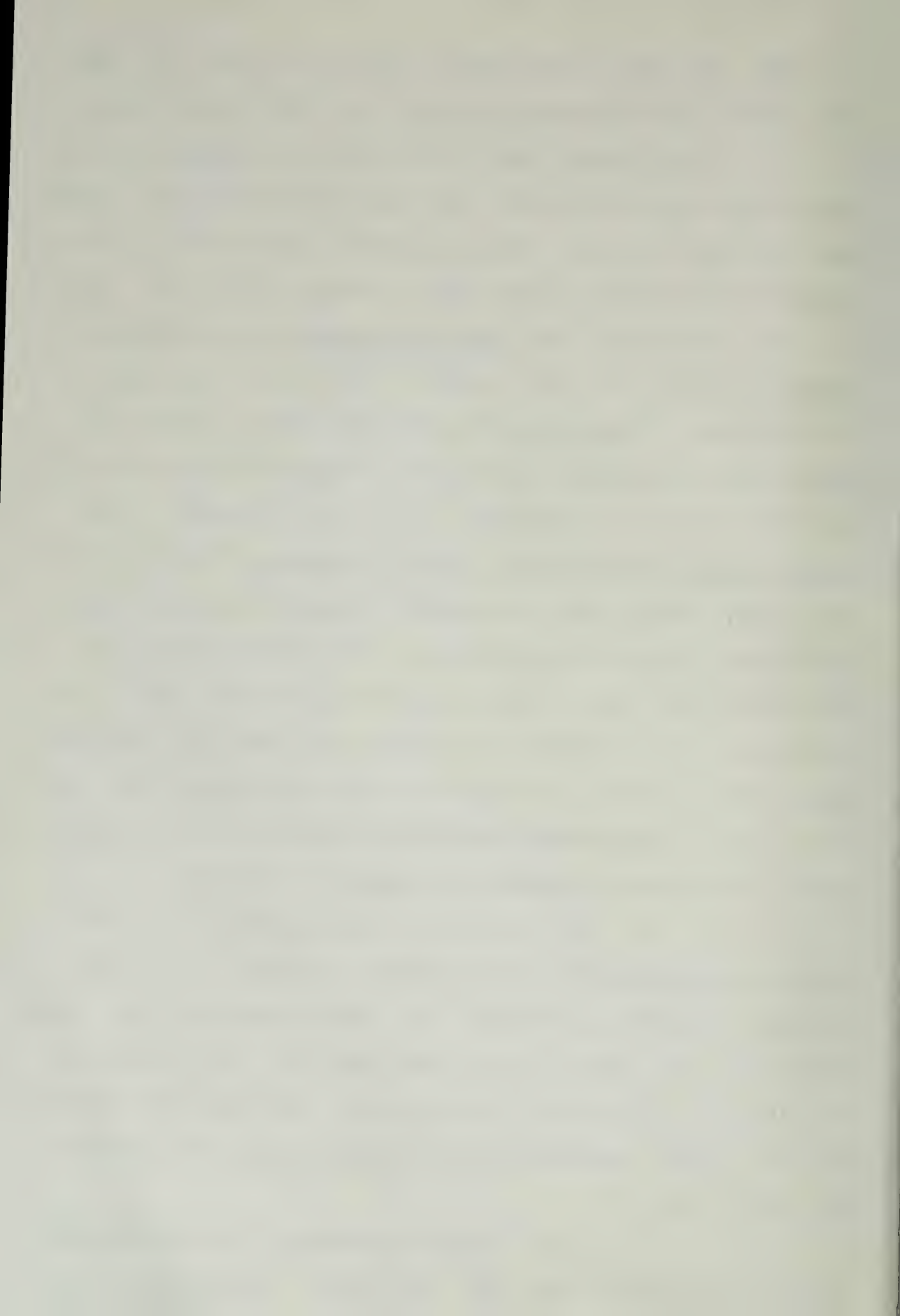


(R. 1957, 1959-1960); Borg-Warner and Norge Sales, (R. 1962, 1963-1964); and California Electric, (R. 1972, 1973-1975).

In the second part of the opinion in Moore, it was specifically held plaintiffs need not prove an express agreement to refuse to deal, that an unlawful combination or conspiracy to be found to exist from a concert of action. (Id. at p. 210, 211-212). (See American Tobacco Co. vs. United States, 328 U.S. 781, 809 (1946).) This Court held that it is sufficient if persons with knowledge that a concert of action was contemplated and invited, "gave adherence to and then participate in a scheme". (Id. at p. 211-212). (See Federal Trade Commission vs. Cement Institute, 333 U.S. 683, 716 (1948).) This Court then found in Moore that there was sufficient circumstantial evidence for a jury to conclude (although there was no direct proof that they had met to discuss Moore, in an attempt to boycott him) that the defendants were liable to Moore for violations of the Sherman Act. (Id. at p. 212). The evidence here fits precisely into the categories of evidence discussed in Moore, as follows:

a. The evidence is uncontradicted that the vendor appellees and co-conspirators refused to deal with Manfree: California Electric, Tr. 3765; Frigidaire, Tr. 4039, 4221; G.E., Tr. 4154; Maytag West Coast, Tr. 3352; Hotpoint, Tr. 3170; A. H. Meyer Co. (as to R.C.A. and Whirlpool products), Tr. 4921, 4994; Lancaster (as to Motorola and Norge products), Tr. 2614, 2615.

b. Also, Manfree requested, and was refused, Sylvania television sets (Tr. 5823-5825); Westinghouse major



appliances (Tr. 5910, 5915-5920); Zenith products (Tr. 5593-5595; 5907-5910); and Motorola products (Tr. 5886-5888).

Indeed, the appellee manufacturers all have admitted that they have continually refused to sell major appliances and television sets to Manfree. (Supra, pages 54-62, 67-69, 74-76).

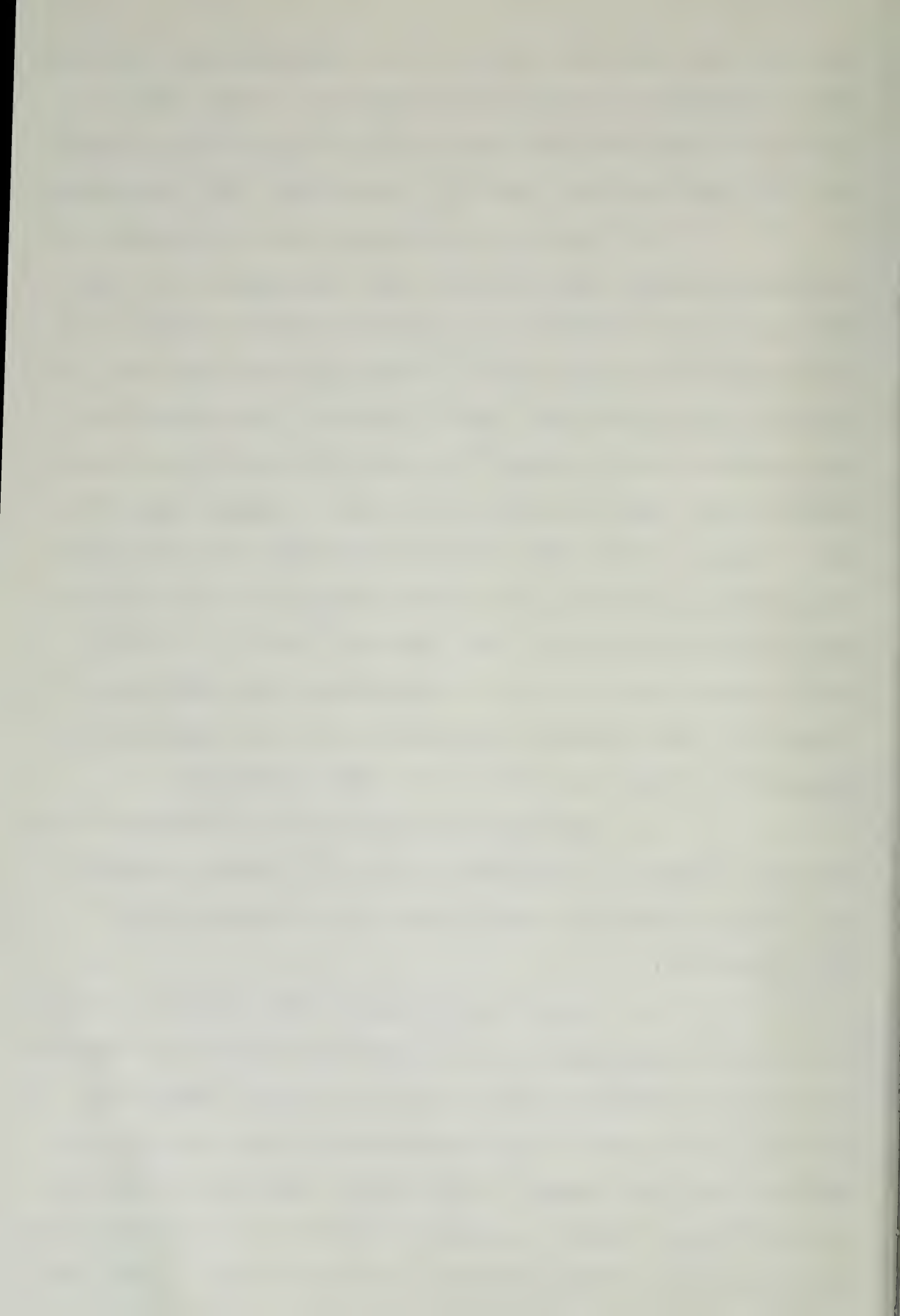
c. R.C.A. and Whirlpool attempted to defend their refusals to deal on the ground that their products were distributed in Northern California by co-conspirator Meyer as an independent party acting completely without influence or control from these manufacturers. The Court below seemingly determined that such a defense was sufficient to overcome appellants' evidence which showed: (1) three parties were involved in list price advertising and tagging; the manufacturer who supplies the list prices and advertising funds, the distributor who fills in the forms, and the retailer who advertises at list and obtains the funds; (2) that the distribution contracts contemplated the freedom of these manufacturers to sell directly to retailers in San Francisco County (Pl. Ex. Nos. 88-I (Tr. 1200); 102, 103); (3) these appellees had the motive and purpose to maintain their own (factory) list prices as the retail list prices in San Francisco County; and (4) that these companies had factory representatives in San Francisco County who were in constant communication with retailers of R.C.A. television and Whirlpool appliances. (Supra, pages 28-30, 35-36; Tr. 4682-4686, 4693-4700, 4724-4727, 4732-4735, 4745-4746, 4751, 4761-4764, 4766, 4768-4769, 5017-5021, 5024-5027, 5032-5034, 5037-5048, 5053-5054, 5060-5061, 5119-5127, 5136-5142). It is reasonable to conclude that these appellees,

by reason of these many contacts and communications, had thorough knowledge of all aspects of marketing of the subject products in San Francisco County during the relevant period. (Tr. 555-558; 571-575; 1215-1217, 1307-1308; 4720, 4732-4736).

d. There was convincing proof of special arrangements between retailer Hale, and appellees R.C.A. and Whirlpool. The evidence was substantial that Whirlpool considered Hale its "key account" in the San Francisco area, and therefore it allowed Hale special factory advertising funds, and provided special models, so that Hale could extensively advertise and sell Whirlpool appliances. (Supra, pages 39-40). Further, R.C.A. held special meetings with Hale representatives in order to assist that company in maintaining its 30% to 40% price margin. (Tr. 188-210, 222-224, 231-275). Hale's advertising of R.C.A.'s television sets under Hale's "signature" was extensive, of which R.C.A. had knowledge by reason of its Form No. 226 (Pl. Ex. Nos. 1842-1846).

e. Appellee Whirlpool sold its "Coldspot" and "Kenmore" brands of appliances directly to Sears & Roebuck Co., which maintained retail stores in the market area. (Tr. 5051-5052).

f. R.C.A. also defended its continued refusal to deal with appellants on the ground that it did not receive a copy of the Manfree letter dated June, 1960, requesting product lines, sent to all manufacturers whose products appellant could not obtain. (But see Tr. 5598-5601 concerning the 1960 demand letter to Meyer). However, it is indisputable that appellants' first complaint, filed in August, 1960, and



clearly alleging a conspiracy to boycott, was served upon this appellee; but R.C.A. continued its refusal to sell television sets to Manfree. Certainly the fact that appellee was sued under the antitrust laws by one seeking to obtain its products does not give R.C.A. legal "justification" to refuse to deal (nor any other vendor appellee). See Bergen Drug Company vs. Parke, Davis & Company, 307 F.2d 725 (1962).

g. R.C.A.'s Southern California selling arm (R.C.A. Victor Distributing Corporation") also refused to sell to Manfree (Pl. Ex. for Id. No. 1702).

h. The record is clear that R.C.A. continued to refuse to sell its television sets to Manfree despite appellant's lawsuit, and its written requests of 1961 and 1963 (Pl. Ex. Nos. 1692, 1698, and 1701).

i. The remaining factory appellees who claim insulation from liability by reason of their distribution agreements with so-called "independent distributors" in Northern California are Borg-Warner (Norge Division), and Hotpoint. As to Borg-Warner, the record is uncontradicted that the requests of Mr. Bert Green in 1959 to obtain Norge appliances for appellants directly from appellee Norge Sales were refused by Mr. Harold Bull, Norge Sales' vice-president. (Pl. Ex. No. 4035). Mr. Bull called a meeting of representatives of Lancaster and Graybar, Norge distributors. At that meeting and in his presence, Mr. Gil Freeman of Lancaster requested Mr. Bonnet of Graybar, Los Angeles, to stop transshipments from that area to U.S.E. (Tr. 2592). Shipments were stopped thereafter (Tr. 5510, 5515-5519).

j. The distribution contract between Norge Sales and Lancaster allowed Norge Sales to sell directly to retailers in San Francisco County (Pl. Ex. Nos. 46A-B, 47A-B, and 48A-B).

k. Hotpoint received notification of distributor Graybar's cancellation of Manfree in 1958. (Pl. Ex. Nos. 525 and 536C). It was customary for representatives of Graybar to discuss the question of franchising discount stores with Hotpoint (Pl. Ex. No. 482) and for Hotpoint sales personnel to visit retail stores with Graybar personnel. (Tr. 3246-3248; 3254-3257).

B. The Appellees Who Distributed The Products Involved In This Case Admitted Their Refusals To Deal With Appellants:

1. Each of the distributor appellees admits its refusal to sell major appliances or television sets to the appellants, sometime during the period of 1957 to August, 1960. California Electric asserted as a defense that Manfree itself chose not to buy Philco appliances from it. (Tr. 3960-3966). Maytag West Coast claimed that part of the reason for its refusal to deal was the dislike of its sales manager for one of Manfree's salesmen. (Tr. 3375-3377). However, these several explanations are precisely like the defense offered by Union Oil Company and General Petroleum in Standard Oil Co. vs. Moore, supra. There, the evidence showed, as here was the case with this appellee, that despite the claim of a willingness to deal and a refusal to buy by the plaintiff, when confronted with a written demand to purchase the defendants there nonetheless refused to sell. Here in 1960 appellants



sent letters to California Electric unequivocally requesting products, and it is uncontroverted that California Electric categorically refused to sell Philco appliances to Manfree (Tr. 5778-5779). In addition, the testimony by Mr. Freeman of Manfree of being told by Mr. Muntain of California Electric that the latter would no longer be able to sell to Manfree because of pressure from other stores (Tr. 5735-5737), is completely contradictory to appellee's proffered "excuse" for refusing to deal. It is to be further noted that the fact that California Electric made a motion to dismiss and for a directed verdict, without placing Mr. Joseph Valenson, its General Sales Manager at the time the events took place, on the witness stand, raises the inference that testimony of Mr. Valenson would be adverse on the question of why appellee refused to deal. Cf. Calif. Ev. Code §§ 412, 413; Interstate Circuit, Inc. vs. United States, 306 U.S. 208, 225-226 (1938). This inference is especially pertinent in view of the extended offers of proof by appellants of evidence to the effect that Mr. Valenson had admitted to Mr. Freeman that, among other things damaging to appellee, Mr. Muntain of appellee had given false testimony in his deposition concerning his company's reasons for refusing to sell to appellant. (Tr. 5859-5863; see 3967-3971).

The evidence is uncontradicted that after appellee California Electric pulled the Philco line from Manfree in 1958, appellant never could acquire the Philco line from that appellee, despite repeated efforts to do so. (Supra, pages 55-56).



Maytag West Coast's asserted reason had a significant and singular late birth: In the deposition taken before trial of Mr. Mitchel, appellee's sales manager, who at trial claimed an aversion to Manfree's salesman, this witness made absolutely no mention of such factors having any bearing on his company's refusal to sell. (Tr. 3414-3432).

Therefore, the evidence is overwhelming that there existed a refusal to sell the subject products to Manfree on the part of appellee and co-conspirator vendors, unbroken over a long period of time. Thus appellants' proof on this point is entirely consonant with the first aspect of the Moore case.

2. With respect to the second aspect of the Moore opinion discussing evidence showing a concert of action, the evidence in this case is strikingly parallel. Moore showed a common purpose among the defendants to maintain retail prices, through discussions pertaining to retail prices between the vendor defendants and their retailers. Here, appellants showed a common purpose on the part of all appellees to maintain the list price of the particular distributor or factory, as the locally-advertised price of the products involved. It is manifest that a retailer will tag its merchandise on the floor at advertised price (or face enraged customers and perhaps the F.T.C.); the fact that it may eventually bargain and sell at a slightly different price in nowise negates evidence that a price-fixing conspiracy existed. To prove a price-fixing conspiracy, one need not show that prices were exactly uniform or the same, but only that a pricing formula was agreed to. United States vs. Socony Vacuum Oil Co.,

310 U.S. 150 (1940); Plymouth Dealers Association of Northern California vs. United States, 279 F.2d 128 (9th Cir. 1960).

Here the evidence showed that each vendor appellee promulgated suggested list prices based on factory list, and that they enforced the maintenance of these list prices by refusing to allow advertising fund credits to retailers unless their advertising was done at the list price. (Supra, pages 28-37). This program was one of enforcing adherence to list prices through the use of advertising funds supplied by the manufacturers, and of not selling to retailers who refused to tag their products at list prices. The evidence of such an express plan by the appellee and co-conspirator manufacturers and their distributors, that "cut" prices or "off-list" prices are not to be utilized in newspaper advertising, is striking and explicit evidence of an unlawful price-fixing agreement. It proves the existence and operation of a combination designed to accomplish the unlawful purpose of price-fixing. For under the rule established in United States vs. Parke, Davis & Co., 362 U.S. 29 (1960), a distributor may only announce its suggested prices and refuse to deal with a non-complying retailer. The enforcement of those prices through a coercive agreement by which advertising funds are utilized by the vendor to enforce prices is beyond the rule of the Parke, Davis & Co. case. United States vs. Arnold, Schwin & Co., 87 S.Ct. 1856 (1967); Lessig vs. Tidewater Oil Co., 327 F.2d 459, 463-464 (9th Cir. 1964). And so, of course, are concerted refusals to deal; United States v. General Motors Corp., supra.

3. This Court also noted in Moore that the evidence had shown that other price cutters were cut off by the defendant distributors. The evidence here shows that another discount store in San Francisco, "GET", (Lakeshore Furniture) was denied the product lines that were denied to appellants, by the same vendors. (Supra, page 71).

4. The Moore opinion also observed there was evidence of communications among defendants concerning supply, storage, marketing and pricing practices. The parallel evidence in this case is: The distributors followed a uniform practice of basing the allowance of cooperative advertising credits to retailers, upon the advertising of suggested list prices. (Supra). California Electric, Lancaster and Meyer invited representatives of each other to their trade shows. (Tr. 2816-2822). Mr. Gil Freeman of Lancaster called these companies "friendly competitors" (Tr. 2817). As in Moore where the defendant vendors uniformly allowed unpublished discounts to selected dealers, here the vendor appellees and co-conspirators treated Hale and the four other large retailer co-conspirators as "key" accounts, allowing them special price lists, or special product models, or special advertising funds. (Supra, pages 37-41). These vertical agreements of favoritism for certain retailers are directly contrary to Congressional policy clearly expressed in the Sherman Act, and the Robinson-Patman Act amendments to the Clayton Act, prohibiting the enlargement of business by means of special deals not fairly afforded to competitors. Such agreements are in fact clear evidence of unlawful plans for market

control. The Courts, it is respectfully urged, must give evidentiary significance to advertising and promotional programs which afford special funds to a single retailer, or a few selected retailers in a given area market (such as San Francisco), in view of this Congressional policy. These agreements create a power to control advertising in newspapers, and thus provide a ready means by which monopoly power is created and exercised. They further provide means by which the already-powerful retailer-advertiser, through its advertising and buying power in the market, can effectively coerce vendors to refuse to deal with competing vendors.

5. This Court in Moore commented upon the defendants' custom of exchanging their products. Here it was shown that the large San Francisco retailers entered into "accommodation" transfers between their stores, allowing them to acquire needed major appliances and television sets from each other. (Pl. Ex. Nos. 434, 435, 444, 445, 448).

6. The decision in Moore noted the defendants' uniform practice of obtaining clearance from each other before signing up new dealers. Similarly, appellants proved how the appellees and co-conspirators worked together in the following respects:

a. When a retailer seeks to purchase appliances, it is reported by the Credit Managers Association of Northern California, of which the distributors were members. (See Tr. 2582-2585; Pl. Ex. No. 551).

b. Hale customarily asked for special advertising consideration, informing the distributor in question

that it demanded such special considerations of all distributors who sold to it. (Pl. Ex. Nos. 798, 799, 800, 801, 802).

c. G.E., Maytag and R.C.A. required retailers to sign affidavits that they had engaged in no comparative price advertising. (Pl. Ex. Nos. 42, and 4372; Pl. for Id. No. 5068).

d. The practice of requiring retailers to report, under oath, the prices at which appliances are sold by them pursuant to a trade association's promotions, was followed and enforced by appellees G.E., Frigidaire, Hotpoint, and co-conspirators Sylvania, Graybar, Meyer, Basford, Redlick, Sterling, Lachman Bros., and Westinghouse. (Tr. 919-923; 933-935; Pl. Ex. No. 2090). This practice was carried on under the auspices of the Northern California Electrical Bureau (N.C.E.B.) of which the parties mentioned were members. N.C.E.B. also had a particular San Francisco unit of which Hale, Frigidaire, Meyer, Lancaster, Lachman Bros., Graybar, Westinghouse Appliance Sales, Sterling and Redlick were members. (See Tr. 1939-1944). California Electric was also a member of N.C.E.B. (See Tr. 3816-3817).

e. Retail co-conspirators Lachman, Redlick, Sterling, Macy's, and (upon occasion) Hale, were members of the San Francisco Better Business Bureau (B.B.B.), Home Furnishing Advisory Group, which held meetings in the late 1950's to establish a uniform code of advertising practices. Hale's representatives attended such gatherings. (See Tr. 3327-3333; 1583-1585). This group worked in unison to establish a "uniform advertising code" for San Francisco retailers,

and sought to enforce it. (See Pl. Ex. For Id. Nos. 384, 390, 391, 392-A, 393, 393(A,B), 400, and 453). Mr. Hobbs, the vice president of Hale, was a member of the Board of Directors of the B.B.B. and occasionally met with Mr. Lachman, president of competing Lachman Bros., at these Board of Directors meetings. (Tr. 1561-1565).

f. This Court commented in Moore about the significance of evidence showing that Moore was a "price-cutter", and the impact of this on a basically closed market. Appellants in the present case showed that Manfree sold major appliances and television sets at its cost, plus a mark-up of 20%. Hale could not meet these prices, and therefore, as the evidence demonstrates, it instituted a campaign to increase margins or maintain margins of 30 to 40% above cost, in San Francisco. (See the testimony of Messrs. Hobbs and Sanford of Hale, concerning their trip to New York and Michigan. (Tr. 188-210, 222-224, 231-275; 510-518, 529-531, 555-567, 571-579, 587).) Manfree was ordered by appellee California Electric (who was selling it Philco products in 1957), not to advertise prices for Philco in the local newspaper that accepted appellants' ads. (Supra, page 44). The jury could reasonably conclude that Manfree would not agree to sell at the suggested list price, and that accordingly it was boycotted because of its pricing policy, as such policy would be fatal to the prevailing list price structure being maintained in San Francisco.

The trial court committed reversible error in not allowing evidence of this character to go to the jury. Reversal of the judgment is required because of the trial court's

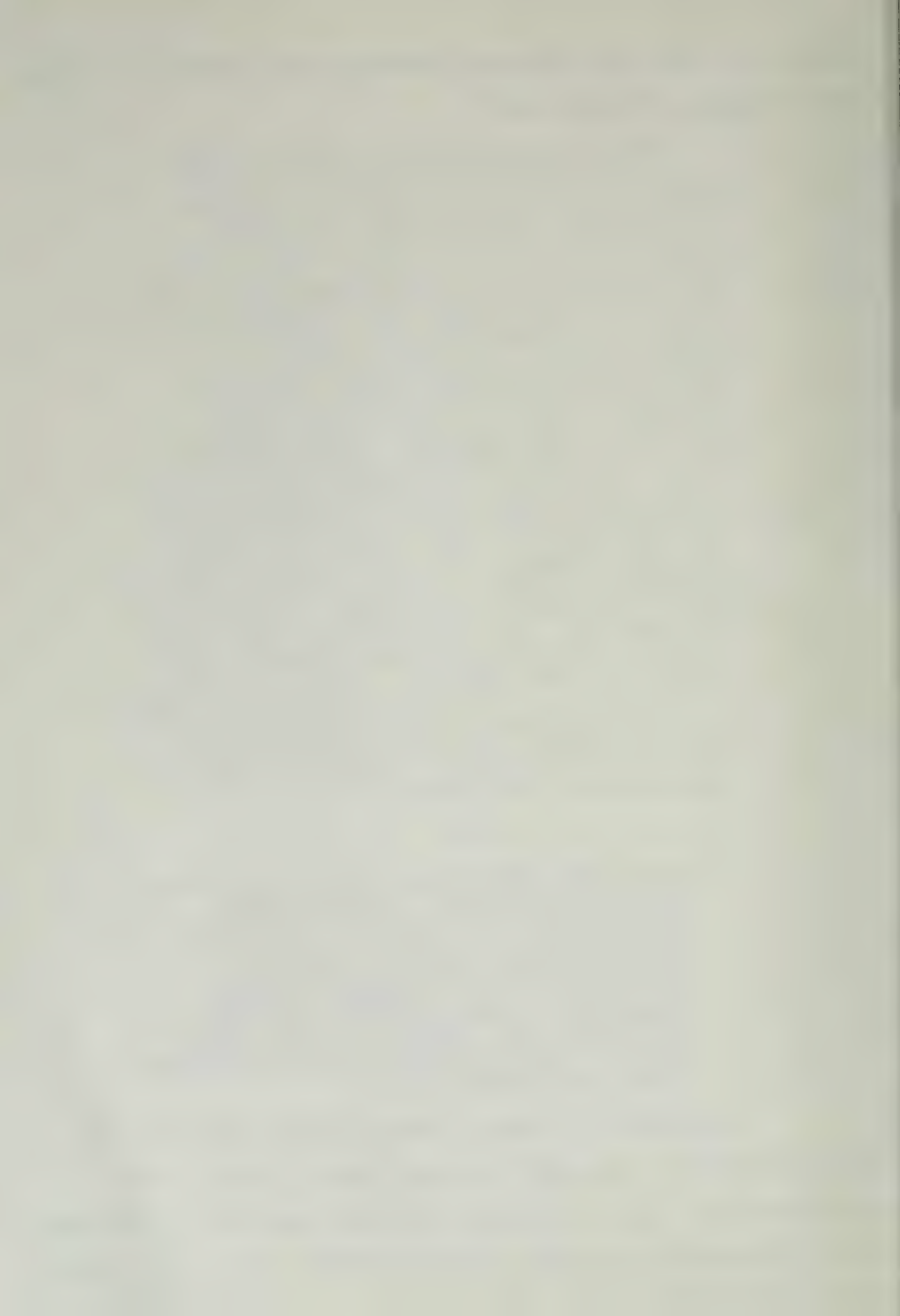
failure to apply the following standards laid down by the decision in Moore, at page 211:

"Where an act or practice of refusing to deal is shown to be pursuant to, or in furtherance of, an agreement, combination or conspiracy, Sherman Act liability is encountered. It is now well established, and it is not here questioned, that an agreement, combination or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws. Concerted restraint of this kind is illegal, even if intended to meet or overcome an admittedly invidious trade practice. Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But if there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability. He will be deemed to have set in motion an illegal undertaking, and will be held accountable for damage caused by the overt act of any member, pursuant to or in furtherance of the plan."

III

THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLEES AND THEIR CO-CONSPIRATORS PARTICIPATED IN A PLAN, THE NECESSARY CONSEQUENCES OF WHICH IF CARRIED OUT, WAS TO PREVENT PRICE COMPETITION IN SAN FRANCISCO AND ELIMINATE DISCOUNT STORES AS SELLERS OF MAJOR HOUSEHOLD APPLIANCES AND TELEVISION SETS, SUFFICIENT TO ESTABLISH AN UNLAWFUL CONSPIRACY UNDER THE SHERMAN ACT.

Appellants' evidence clearly showed that discount stores provided a markedly different way to retail major appliances and television sets; that they ignored list prices; that a combination seeking to keep retailers in a given market



"tagging" such products at list prices would be threatened (and would recognize such) by this new type of retailing.

1. Evidence was presented that Hale took concrete steps to prevent and remove the type of competition threatened by Manfree: Mr. Sanford, General Manager of Hale, had discussions with Mr. Hurd, Vice President of Hale, concerning the competition created by discount stores. (Tr. 995-1014). They had discussions as to whether or not Hale should take on brands carried by discount stores. (Tr. 1002). U.S.E. was specifically known to Mr. Sanford, and he cut out and discussed its advertisements showing prices, with Mr. Hurd. (Tr. 995-998). Mr. Sanford specifically admitted that he might have discussed whether or not Hale would carry the Hotpoint line, because it was being carried by "competitors", with representatives of Lancaster, the distributor. (Tr. 1343-1344). Mr. Hobbs and Mr. Sanford discussed the discount store situation and its impact on prices, deciding that Hale should attempt to obtain a price margin of a 40% mark-up. (Tr. 202). Hale attempted to tag major appliances and television sets at the manufacturer's suggested list price, (Tr. 210, 614, 603, 604, 858, 898, 1431, 1453), and promulgated a memorandum to its store managers stating that it would "beat" the discount houses. (Pl. Ex. No. 739).

2. As noted previous, Manfree was cancelled by Lancaster during this period, specifically the jury could find because Hale had demanded that it not sell Norge appliances to Manfree. (Tr. 1343-1345). At the time Hale did not advertise Norge appliances (Pl. Ex. No. 644); thus it may reasonably be

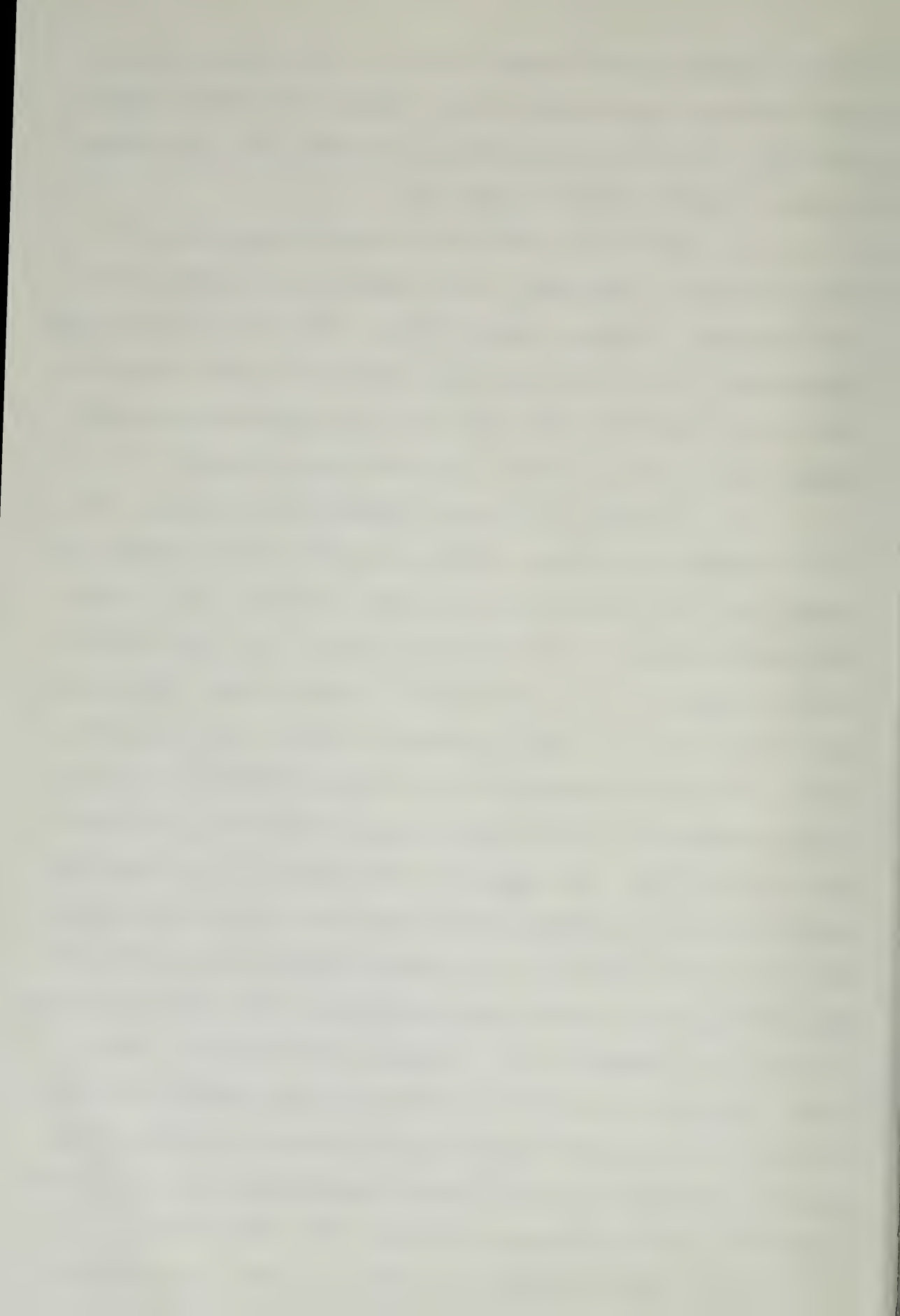


inferred that this was coercive action by a major retailer with important advertising power, designed to obtain compliance with its wish that Manfree be excluded from all sources of supply for the subject products.

3. California Electric cancelled Manfree as a Philco dealer in September, 1958, because of pressure from other dealers. (Supra, pages 43-44). Hale was an "associate distributor" for Philco, and was serviced in this category by California Electric. Hale was one of its biggest accounts. (Supra, pages 40-41, and Pl. Ex. Nos. there listed).

4. Graybar, the local Hotpoint distributor, cancelled Manfree in October, 1958, at which time Mr. Mayben of Graybar told Mr. Freeman that Graybar could not sell to the department stores in San Francisco County, while selling to discount stores. (Tr. 5797-5798). At this time, Graybar also adopted the policy, (also followed by other local distributors), of basing cooperative advertising credits to retailers on the suggested list prices promulgated by the distributor. (Pl. Ex. No. 339A; see supra at pages 32-33). While Manfree carried Hotpoint products, retailers such as co-conspirators Sterling, Hale, Redlick, and Lachman refused to buy Hotpoint; but shortly after Manfree was cancelled, these retailers began to carry the Hotpoint line. (Supra, pages 65-66). These "key" retailers were told at a San Francisco meeting held by Graybar to inform that Graybar had "changed its policy" with respect to distribution of Hotpoint appliances, and would not thereafter sell to discount stores. (Tr. 6120-6125).

5. Shortly prior to March 10, 1959, when Maytag



West Coast cancelled Manfree's dealership, Mr. Sanford of Hale and Mr. Mitchel of Maytag West Coast discussed the Maytag line for Hale's stores. Mr. Sanford admitted he inquired about Maytag's intentions concerning its then-existing dealer organization in San Francisco. (Tr. 1111). As has been pointed out, when Manfree was cancelled, Hale became a Maytag dealer and made a \$11,000.00 purchase order, and received a \$3,000.00 advertising credit from Maytag. (Supra, pages 46-47). As was the case with Hotpoint, while Manfree carried Maytag, Hale did not sell or advertise Maytag appliances, but after the cancellation of appellant, it became a leading dealer of Maytag (ibid.), as did co-conspirators Sterling and Lachman Bros. (Pl. Ex. Nos. 641, 4161, 313, 318; Tr. 3336-3337).

6. The evidence thus shows that co-conspirator Hale was a "key" retail account in San Francisco for the factory appellees Whirlpool, Borg-Warner, R.C.A., Maytag, and Philco (supra), and was a key advertiser for Frigidaire, G.E., and California Electric. (Pl. Ex. Nos. Frg: 237, 781, 4297, 937, 2070, 2059; G.E.: 708, 715, 712, 713; CESCo: 654, 655, 656, 1847-1898, 1369). Alone, or together with the other retailer defendants, it had the market power, and thus the authority to compel acceptance from the vendors of a plan to prevent the successful entry of discount stores into the San Francisco retail market for the subject goods. Each of the vendor appellees or co-conspirators, through their sales representatives, admitted to appellants that they could not sell to Manfree because of their existing dealer structure, or because of

pressure from Hale; direct evidence that discount stores could not be sold the subject products without the vendors facing the loss of their local big department and appliance store accounts. The inferences to be drawn from these statements rest within the exclusive province of the jury. Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 200, 202-204 (9th Cir. 1963); Standard Oil Co. of California vs. Moore, 251 F.2d 188, 210 (9th Cir. 1957). And, it is clear that the statements showed a concert of action, since they showed directly, or by reasonable inference, that Hale and other large retail stores (including the retailer co-conspirators) were clearly bent on eliminating competition in the San Francisco market from the new discount stores. (Tr. 1111, 5509, 5808, 5979). Taken together or singly, these various statements show the existence of a plan to boycott Manfree by co-conspirator Hale and the other retailers in San Francisco. The opportunity of all the conspirators to acquire knowledge of the plan was proven to exist in the various instances during the relevant period where representatives of these respective companies--"friendly competitors"--met and discussed the local market. See American Tobacco Co. vs. United States, 147 F.2d 93, 119 (6th Cir. 1944), aff'd 328 U.S. 781 (1946); Morton Salt Company vs. United States, 235 F.2d 573, 576-577 (10th Cir. 1956); Continental Baking Co. vs. United States, 281 F.2d 137, 151-152 (6th Cir. 1960). And, an additional essential point is that each vendor who cancelled Manfree, was shown to have had representatives who had "discussions" about market conditions with people from Hale and



other large local retailers, both prior to such cancellations and afterwards. (Ibid.)

The representatives of the vendors who never did sell to Manfree, such as G.E. (Tr. 5843); Frigidaire (Tr. 5829); and Meyer (Tr. 1217-1220, 5609), all testified that they believed that sales to Manfree would place their local dealer structureship in a precarious position. (Supra, pages 67-69). The boycott of Manfree was thus shown to have been achieved in a market where the retail defendants controlled advertising and maintained the list price as tag price. All appellees were shown to be aware of these practices.

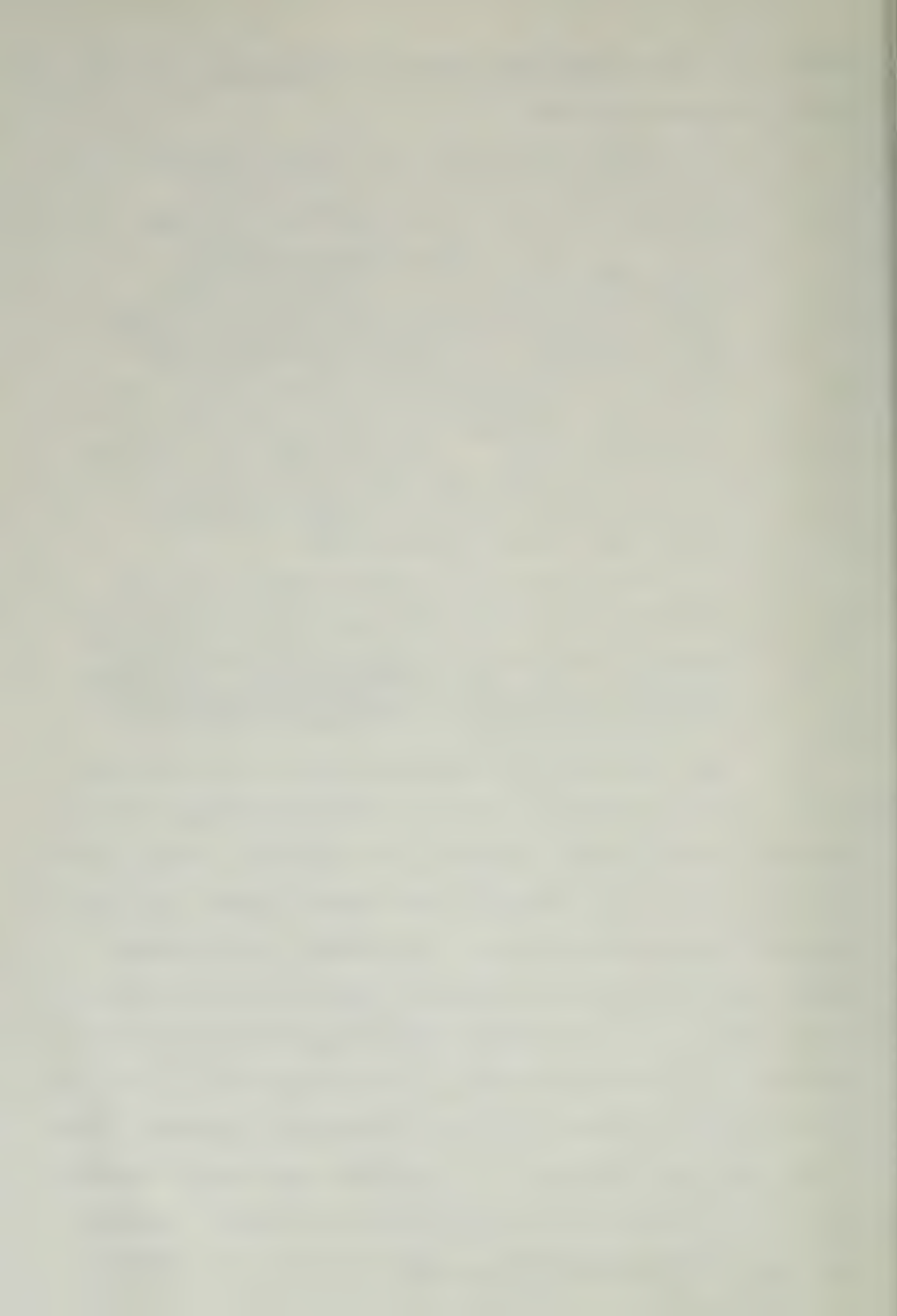
This is not a case where products are in short supply (cf. Independent Iron Works vs. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963), strongly relied upon by the Court below), but a case in which there was an abundant supply of major appliances and television sets, and in which the distributors and factories were planning and promulgating extensive sales programs, give-aways, and even paying salesmen cash bonuses (called "spiffs") to sell their products. (Tr. 4018-4020). Real competition in the market would have required the vendors, in the exercise of good business sense, to sell to stores like Manfree with a heavy volume of traffic and with the opportunity of selling in large quantities. (See Pl. Ex. for Id. No. 1500-1). Only a concert of restrictive action, not a free market condition, would prevent large discount stores from obtaining needed supplies of leading brands of such merchandise. As the Supreme Court noted in its recent opinion concerning a concerted boycott of discount

stores, in United States vs. General Motors Corp., 384 U.S. 127 (1966), at pages 427-428:

"There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings Some purchasers found and others believed that discount prices were lower than those available through franchised dealers Certainly, complaints about price competition were prominent in the letters and telegrams with which the individual dealers and salesmen bombarded General Motors in November 1960. . . . And although the District Court found to the contrary, there is evidence in the record that General Motors itself was not unconcerned about the effect of discount sales upon general price levels.

"The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders." (Emphasis added.)

The vendors were clearly placed in a position of having to choose whether to sell to the large department and appliance stores at the expense of the discount stores, or to sell to the discount stores at the expense of the large department and appliance stores. The retail conspirators clearly demanded this alternative. Applying the law to the facts, then it is respectfully urged that the evidence was substantial, if not conclusive, to the effect that a plan to boycott Manfree existed and was successfully executed. Such a plan, and participation in it by appellees and co-conspirators, is of course an obvious restraint of trade. Klor's, Inc. vs. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959);



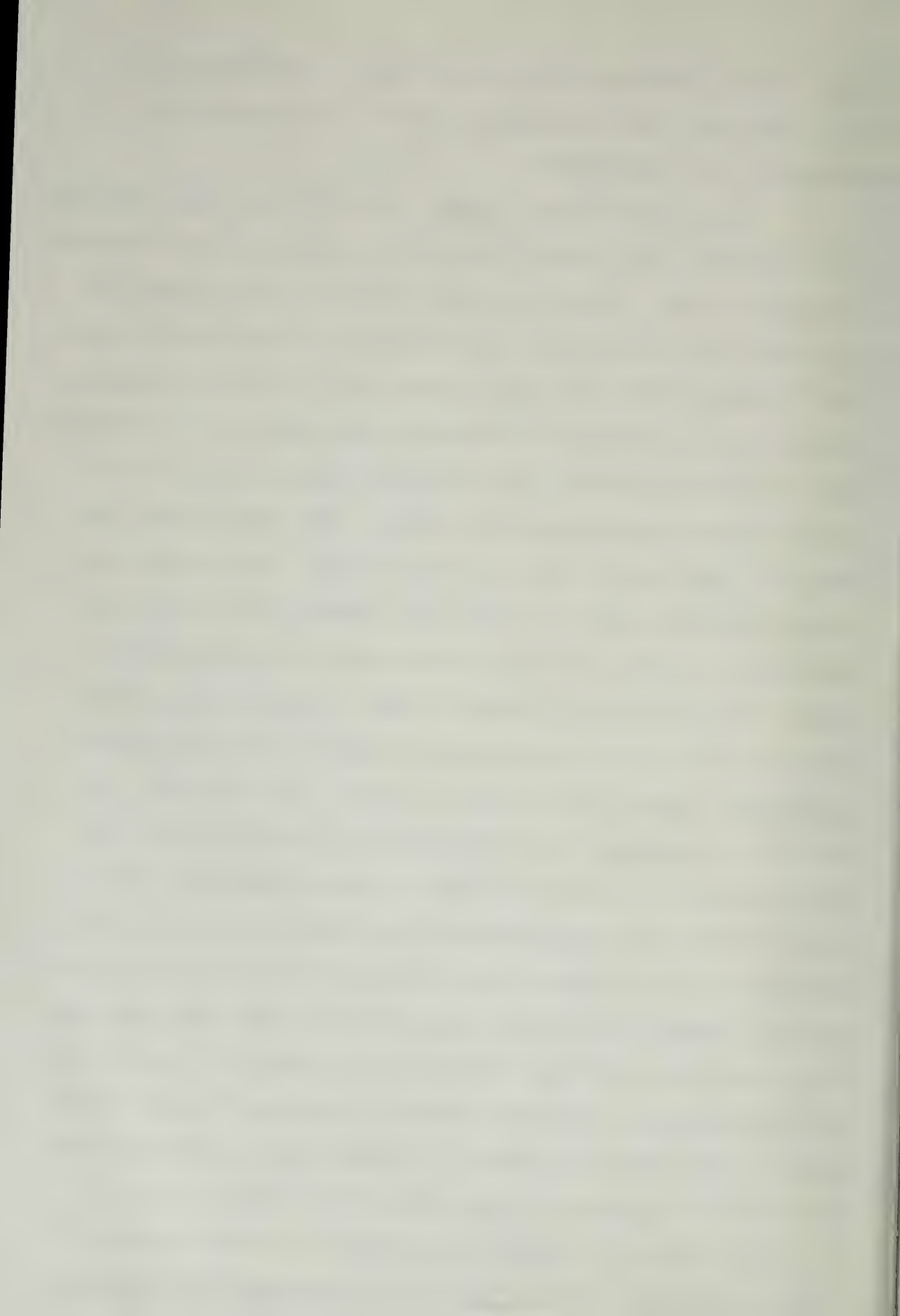
IV

THE ADMISSIONS BY REPRESENTATIVES OF APPELLEES THAT THEY REFUSED TO DEAL WITH APPELLANT MANFREE BECAUSE IT WAS A DISCOUNT STORE, IS IN ITSELF EVIDENCE SUFFICIENT TO GO TO THE JURY FOR IT TO DETERMINE IF THERE WAS AN UNLAWFUL CONSPIRACY.

1. Maytag admitted that its decision not to sell to Manfree was based, at least in part, on the fact that it was a closed-door discount store. (Tr. 3379). Mr. Hamilton, Frigidaire's Sales Manager, told Mr. Freeman of Manfree that Frigidaire would not sell to discount stores, and that it would be a waste of time to have a Frigidaire representative call on Manfree. (Tr. 5825-5829). Mr. Lau, G.E. Sales Counselor, readily testified that he did not bring a blank franchise form when he called at U.S.E., because "it was management's decision in General Electric not to franchise a closed-door operation." (Tr. 5350-5354). G.E. did not sell to "closed-door" discount stores. (Tr. 5301-5302). The sales representatives of California Electric did not sell to discount stores after 1958 in the San Francisco area. (Pl. Ex. No. 792; Tr. 3765, 3782). Representatives of Meyer would not sell to discount stores in San Francisco, as discount store type advertising in the newspapers was against the express policy of Meyer of refusing to give cooperative advertising credit to any retailers who engaged in so-called "cut-price" advertising. (Pl. Ex. No. 1161; see supra, pages 35-36). Whirlpool deliberately maintained a high profit margin for retailers in San Francisco, at the request of its

"key" retail accounts (Pl. Ex. No. 4227). Borg-Warner's Norge Division directly participated in the boycott of Manfree. (Tr. 2590-2592).

The record shows (supra, page 71) that most of these same suppliers also refused to sell to another local discount store called GET. When considered with the plain proof of the boycott of Manfree by these suppliers, there was substantial evidence that each distributor put into effect a general program not to sell major household appliances and television sets to discount stores, but to limit those stores to supplies of small appliances and radios. (Tr. 5857-5859, 5863-5866; Pl. Ex. for Id. Nos. 5117 and 5118). The reasons advanced for this conduct by the local distributors were not peculiar to Manfree, but were applicable to all discount stores in San Francisco County. This uniformity of policy forms the basis of a permissible inference of joint action. Milgram vs. Loew's, Inc., 192 F.2d 579, 583 (3rd Cir. 1951). Here, as in Milgram, each supplier was acting against its best economic interests in refusing large potential orders from Manfree, who made absolutely no demands that any other retailers not be supplied the products it sought to purchase. Absent a concert of action, there was no reason why the public in San Francisco was deprived, as it was, of the benefits of the competition between discount stores and Hale and the other large appliance stores. A proclivity to unlawful conduct noted in Milgram is also noted here. Hale, R.C.A., G.E. and Whirlpool were before the United States Supreme Court in the case of Klor's, Inc. vs. Broadway-Hale Stores,

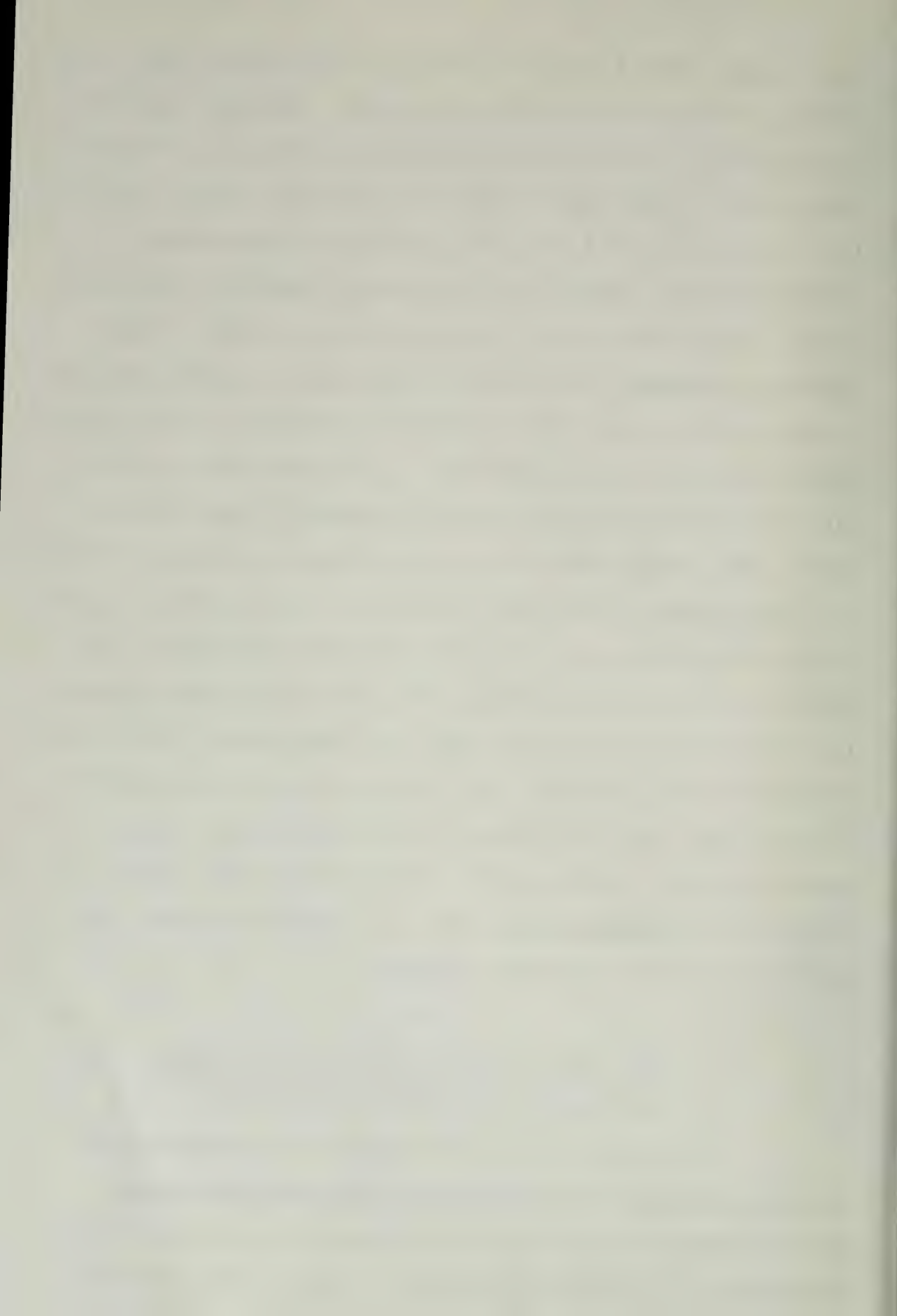


Inc., supra, upon affidavits which failed to deny that a conspiracy existed in San Francisco County, organized by Hale, and designed to exclude plaintiff Klor's, Inc. as an active competitor in major appliances and television sets. Also included in that suit were the present co-conspirators Basford, Philco, Zenith, and California Electric's predecessor as Philco distributor, Dallman Co. (Tr. 3934). These companies asserted their right to exercise a boycott against a competitor of Hale, at its demand. (Manfree was then also being deprived of such products, at the same time as Klor's was being subjected to a boycott apparently based on erroneous legal advice that such conduct against a single dealer was not unlawful under the Sherman Act.) It is thus respectfully asserted that the District Court in the present case failed to give proper judicial significance to the evidence (recognized in its opinion) that the distributors had in fact stated in trial testimony that their policy not to sell to "closed-door" discount houses was the reason for their refusals to deal. It therefore erred, as the trial court erred in the General Motors case, in failing to apply the applicable law to the proven facts.

V

THE COURT FAILED TO GIVE PROPER LEGAL
SIGNIFICANCE TO PROOF THAT APPELLANTS
WERE DENIED NEWSPAPER ADVERTISING.

The fact that the co-conspirator newspapers, the San Francisco Examiner and the San Francisco Chronicle, adopted common policies against allowing any discount store advertising, is further substantial proof of the existence



of a powerful combination to prevent competition from discount stores in the retailing of major appliances and television sets. The testimony of Mr. Mittelman, former advertising manager for U.S.E., admitted against all appellees, showing that appellants were unable to advertise in the San Francisco morning newspapers, is given no effect by the Trial Court. (R.1918-1920 ; supra, pages 52-53). But this is the very kind of circumstantial evidence which demonstrates the existence of a boycott conspiracy. Indeed the record shows that there was evidence that Hale as a leading local newspaper advertiser, applied pressure on The Examiner to refuse discount store advertising, but such evidence was stricken. (Borg-Warner Ex. No. 9024).

The circumstantial evidence of combined retail store pressure to prevent discount store newspaper advertising was substantial: Mr. Mittelman testified that Lachman would not advertise in the San Francisco Call-Bulletin because of U.S.E. advertising in that paper. (Tr. 2035-2046). Redlick did not advertise in the San Francisco Call-Bulletin, and Hale substantially reduced its advertising in the Call-Bulletin in 1959, when U.S.E. ads were being carried in that paper. (Tr. 332-333). Sterling, the only co-conspirator retailer then advertising in the Call-Bulletin, requested a meeting with the advertising director of the Call-Bulletin in 1960, to discuss U.S.E. advertising. During this time Sterling, Redlick, Lachman, Macy's and The Emporium were meeting at the B.B.B. to discuss a "uniform" advertising guide for San Francisco retail merchants. The witnesses who were present

at that meeting "could not recall" what was specifically discussed there. (Supra, pages 70-71). Nonetheless, it is highly probative of appellants' claims that the witnesses admitted attending such a meeting for the purpose described, in the context of the denial of advertising to U.S.E. at that time in the other two local newspapers, and the refusals to deal with Manfree by the vendors.

VI

THE RECORD SHOWS THE IMPEACHMENT OF WITNESSES WHO CLAIMED THERE WAS NO CONSPIRACY.

It is clear that the trial court was presented with a record from which the trier of fact could choose to disbelieve the testimony of various interested witnesses who claimed there was no agreement among the defendants in refusing to sell to Manfree. In such a situation, the trial court is required to submit the case to the jury. Continental Ore Corporation vs. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); Milgram vs. Loew's, supra; Girardi vs. Gates Rubber Co. Sales Division, supra.

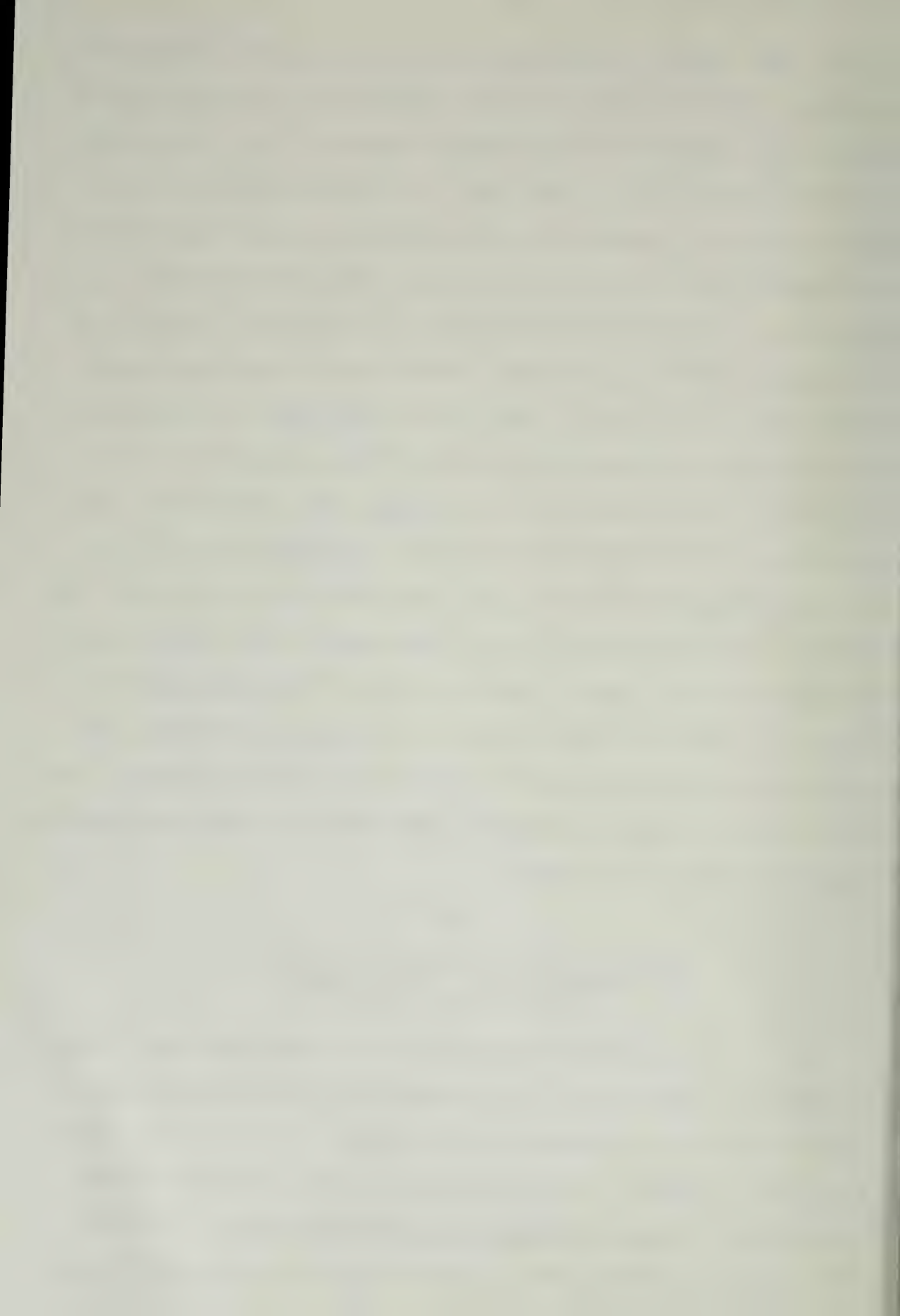
The interested witnesses who testified there was no agreement to boycott Manfree were impeached as to that testimony: Witness Hobbs, ((Tr. 159); Mr. Hobbs destroyed his business files during this litigation, (Pr. Tr. 425-428)); witness Sanford, (Pr. Tr. 909-914, Tr. 998-1007, 1009, 1340-1346); witness Paul Thomas (who was shown to have filed false and misleading Answers to Interrogatories (Pl. Ex. No. 4269; Tr. 1444); and who also threw away business records during the pendency of this action, (Tr. 1528)); witness John P. Mitchel,

((Tr. 3419-3430); Mr. Mitchel did not mention Mr. Neermann's asserted drinking habits in his deposition); witness Lloyd B. McDonnell, President of California Electric, (Tr. 3632-3634); witness Muntain ((Tr. 3961-3966); the Court ruled this was technically not impeachment, and refused to allow appellants to impeach Mr. Muntain, (Tr. 3941)). Witness Gilbert F. Hamilton, Appliance Sales Manager for Frigidaire, erased his notes made during a telephone conversation concerning appellants (Pl. Ex. No. 491), and his testimony that Frigidaire had no policy against selling to closed-door stores was contradicted by his statement to Mr. Freeman (Tr. 5825-5829). Witness Saxon, Vice President of R.C.A., testified that R.C.A. did not "classify" dealers (Tr. 4606) yet Pl. Ex. Nos. 92, 93 and 94 clearly show that R.C.A. distributed forms which classified retailers (Id.); (see Tr. 4774). Thus, clearly the jury was entitled to believe the appellants' witnesses, and not believe the witnesses who testified, to the contrary, that there was no agreement between appellees and their co-conspirators in restraint of trade.

VII

EACH OF THE APPELLEES IS LIABLE
TO APPELLANTS FOR VIOLATIONS OF
THE SHERMAN ACT.

Under standards applicable to conspiracy law, "any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy . . . not only action, but lack of action, may be enough to infer a combination or conspiracy." Esco Corporation vs. United States, 340 F.2d 1000, 1008 (9th Cir. 1965). All the appellees admitted they



were each in a position to supply Manfree with the products denied it, with the exception of manufacturers R.C.A., Whirlpool, Borg-Warner, and Hotpoint, who asserted immunity because their goods were distributed in the market area by allegedly "independent" distributors.

The defense of these manufacturers ignores the evident purpose of the present conspiracy, to maintain list prices at the retail level, and exclude those who are unwilling to advertise or tag these products at list prices which stem from the manufacturer. (See evidence of extensive manufacturer-distributor contacts at page 24, supra; and record references at pages 28-37, supra). The manufacturers provided the list prices for their goods, which clearly were precisely followed by the distributor, or became the obvious base for the distributor's list prices. (Pl. Ex. Nos. 5114 and 5116). They provided the advertising funds to advertise their products at list prices, under programs requiring adherence to such prices by the retailer in order for it to obtain advertising support funds. (Supra, pages 28-37). Thus, the manufacturers directly and knowingly supported a price-control scheme when they refused to sell to Manfree. They cannot excuse themselves from liability by reference to their distribution agreements, since their own refusals to deal with Manfree were in support of their own policy to support their list prices, and to thereby control list prices in San Francisco. United States vs. Arnold, Schwinn & Co., supra; White Motor Co. vs. United States, 372 U.S. 253, 260 (1963).

Thus the conspiracy had four steps in its implementation

(1) The manufacturer provided the list prices, and funds for list price advertising; (2) the large appliance, furniture and department stores in the market who did most of the advertising of the subject products in the San Francisco newspapers followed list prices, and required the exclusion of Manfree as a seller of such advertised products; (3) the distributors refused to deal with Manfree, as it did not follow list prices in support of the factories' list price maintenance program; and (4) the manufacturers, in order to support and abide by the plan, also refused to sell to Manfree. The record abundantly shows the implementation of each of these steps:

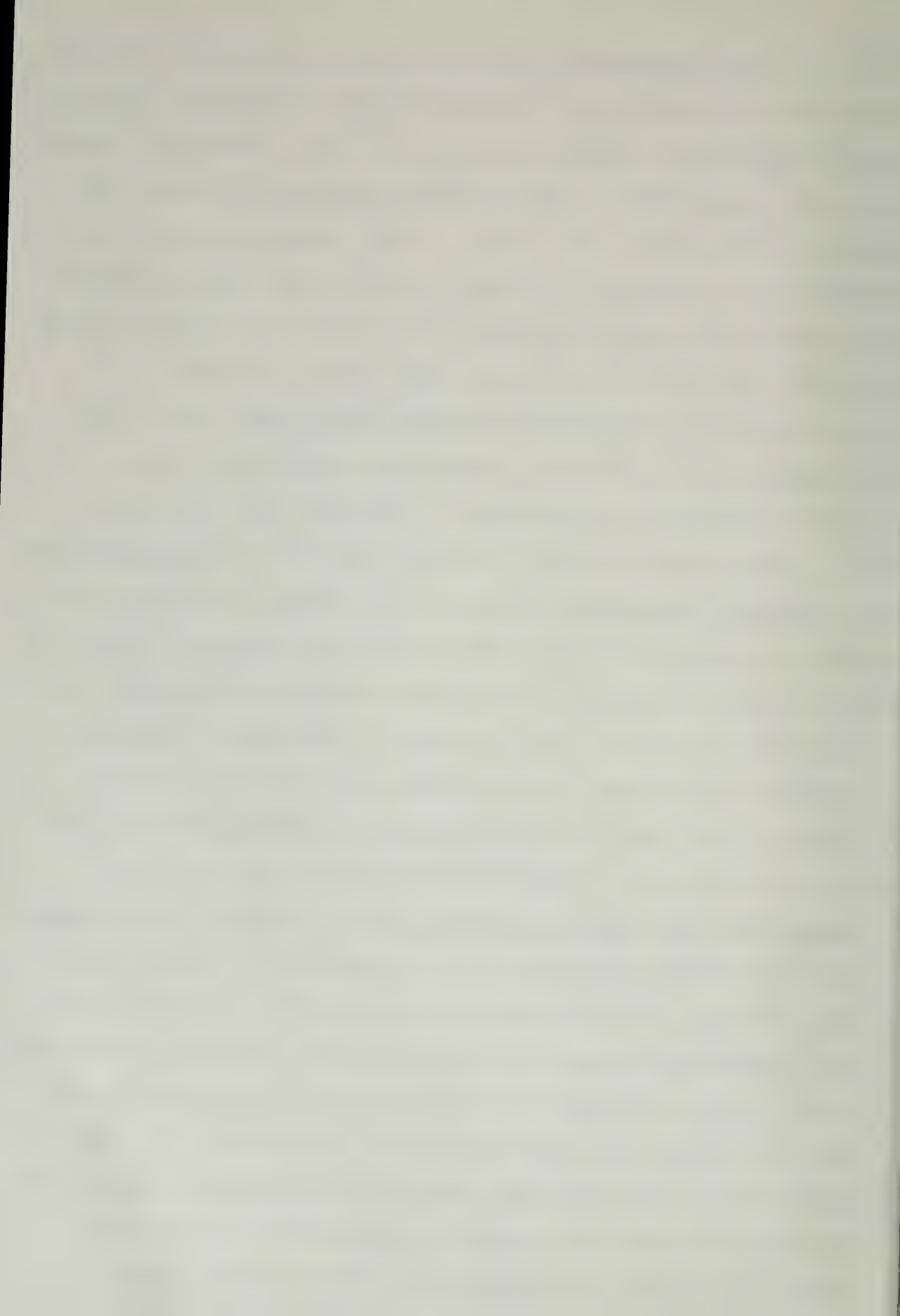
1. Whirlpool established a retail list price method of distribution for its products, and the evidence showed that its San Francisco distributor, Meyer, adhered precisely to those prices 60% of the time during the relevant period. (Pl. Ex. No. 5115). Contrary to the statement in the Trial Court's opinion (R. 24-25), Whirlpool deliberately allocated funds to Meyer for the specific use of Hale, and only for that large retailer. (Pl. Ex. Nos. 685, 689; Tr. 579, 1262-1275). It is claimed that Meyer's advertising-fund policy of restricting such funds only to retailers who advertised at list prices, was unknown to Whirlpool (Tr. 5028); but this is clearly a strained and false inference; Whirlpool knew that San Francisco retail price margins on the subject goods were higher than elsewhere, because of the price demands made by representatives of its key accounts in San Francisco directly to its officers. (Pl. Ex. No. 4227; see pages 118-9, supra).

Whirlpool itself directly refused to deal with

Manfree, saying this was a distributor function (Pl. Ex. Nos. 1718, 1721); although it directly supplied Sears & Roebuck Co., a nationally-known retailer, with its products. (Tr. 5051-5052). Whether this reason was a bona fide one, or part of Whirlpool's participation in a conspiracy, was a question for the jury to decide, in the context of all the other evidence (Continental Ore Corp. vs. Union Carbon & Carbide Corp., 370 U.S. 690, 699 (1962)), and not compartmentalized by itself.

2. R.C.A. was shown to have promulgated a program of distributing its television sets by providing its distributors with retail price sheets. The jury could find that these list prices were followed by its San Francisco distributor, Meyer. (Pl. Ex. Nos. 5114 and 5116). R.C.A. further carried on periodic special dealer advertising programs, and knew that its television sets were being extensively advertised by the retail defendants in San Francisco. (Pl. Ex. Nos. 1842-1846). Further, its sales representatives were in close contact with large R.C.A. retailers in the market area: Regional representative Mr. Dan Gentile periodically visited such stores (Tr. 4749-4751); and its regional sales manager, Mr. Folsom, also periodically visited the large retailers in San Francisco County (Tr. 4732-4736). In 1958, Meyer arranged a meeting between the President and Vice President of R.C.A. and Mr. Hobbs, Hale's Vice President, and Mr. Sanford of Hale to listen to Hale's pricing problems. (Pl. Ex. Nos. 349 and 350). R.C.A. therefore had direct knowledge of Hale's plans to maintain high profit margins. The fact that San Francisco dealers' demands for high margins was known to Whirlpool (Pl. Ex.

No. 4227) was information equally available to R.C.A., who also had field representatives in close contact with Meyer, the common distributor. Indeed, it was R.C.A. who assisted Mr. Hobbs of Hale in obtaining a meeting with Whirlpool's general manager, Mr. Sol Goldin (Tr. 249). R.C.A. refused to sell television sets to Manfree, despite the fact that its distributor's agreement with Meyer expressly allowed it to sell its products in this territory (Pl. Ex. Nos. 1692, 1693, and 1695). It also enforced a reluctantly-accepted distributor territorial arrangement in California, through its subsidiary, R.C.A. Victor Distributing Corporation. (See Tr. 4415, 4489-4490; A. H. Meyer deposition Tr. 10:15-22, 15-17.) Cf. United States vs. Arnold, Schwin & Co., supra. Its regional representatives were in close contact with Meyer (see above) and that company's policy against cut-price advertising could thus logically have been known by R.C.A. (Tr. 1215-1217; 1307-1308). Once again, reasonable inferences to that effect could be made by the trier of fact, when considering all the evidence pointing to R.C.A.'s knowledge of and participation in the conspiracy (Continental Ore Corp. vs. Union Carbon & Carbide Corp., supra.) Meyer was indeed enforcing R.C.A.'s retail list prices with local dealers. (Pl. Ex. Nos. 5114 and 5116). R.C.A.'s business forms were designed to provide it with complete knowledge of the dealer structure in every county in the United States (see Form Number 621, Pl. Ex. Nos. 92, 93 and 94). It was the instigator of the very price margins for television sets which the retailer defendants sought to enforce in San Francisco County, which price structure would be threatened should



Manfree obtain and sell such products.

3. Borg-Warner's basic defense that it was not directly engaged in the distribution of Norge appliances was found to be without merit. (R. 1962). Thus it and Norge Sales may be considered as one actor for purposes of this appeal. (Ibid.) Such a meritless defense of claiming separate entities between Borg-Warner and Norge Sales was presented because appellees lacked any defense on the merits of the conspiracy action. There was direct evidence that these appellees participated in a boycott against U.S.E. and Manfree: they had knowledge that U.S.E. attempted to obtain Norge appliances from Lancaster, through Graybar. It imposed a fine upon Graybar, Los Angeles, because it transshipped Norge appliances into Lancaster territory (San Francisco) for U.S.E. (Pl. Ex. No. 4023). It refused to permit Mr. Green, appellants' Los Angeles agent, to buy for appellants, after written requests were made to it for Norge products. It is inconceivable, to reasonable men, that Mr. Harold P. Bull, a senior official of Norge Sales, could sit in a meeting in San Mateo with Mr. Freeman, Mr. McDonnell and Mr. Bonnet from their distributor companies and not learn or know of the details of the San Francisco major appliance market, and the boycott against Manfree. (Supra, pages 49-52).

Norge Sales, as did Whirlpool, allocated special advertising funds expressly for the benefit of Hale, setting this retailer up as its "key account" for Norge in San Francisco. (Pl. Ex. No. 4099). The 1960 letter by Mr. Alpine requesting a franchise for Manfree from appellee was sent to Mr. Gil



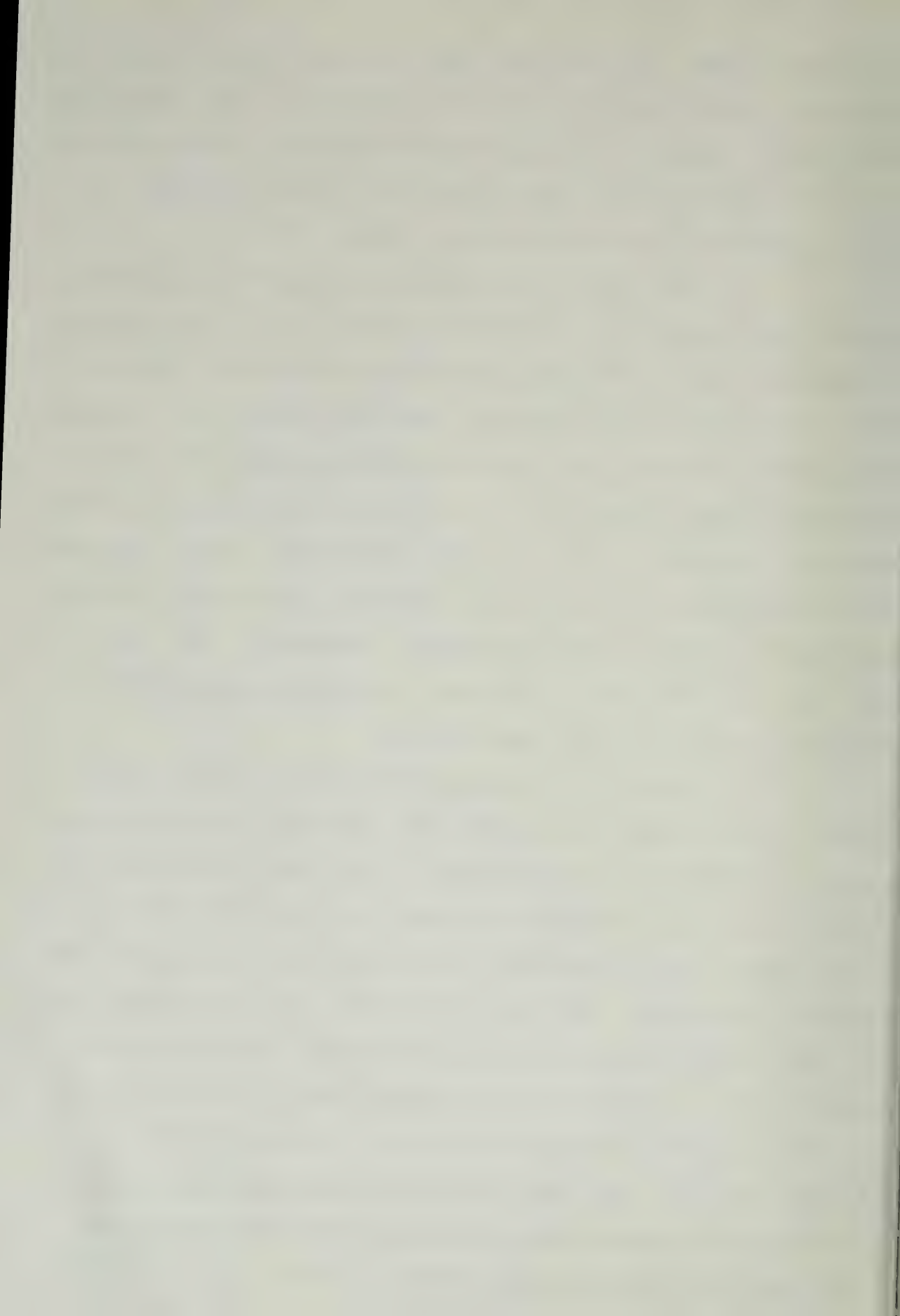
Freeman, Sales Manager of Lancaster, who met with Mr. Bull at the Villa Hotel in San Mateo. It was Freeman who told Mr. Bonnet to stop transshipping Norge appliances into San Francisco. (Tr. 2592; Pl. Ex. Nos. 553 and 556). Borg-Warner also promulgated price sheets to Norge dealers showing retail list prices, which prices supplied the retailers in San Francisco with the price margins Hale sought to enforce through the boycott. (Pl. Ex. No. 1924). Borg-Warner's factory representative in Northern California, Mr. Gene Schick, was in close contact with Lancaster and discussed dealer relationships. (Tr. 2911-2918, 3010-3015). Mr. Schick investigated the transshipments by Graybar at Mr. Gil Freeman's (Lancaster) request, and admitted he probably talked with Mr. Bull about the matter. (Tr. 2966-2972). Borg-Warner also maintained dealer purchase and advertising forms from which it could obtain complete knowledge of the retail appliance dealer structure in San Francisco. (Pl. Ex. Nos. 4058-4059, 50, 4101).

4. Hotpoint received direct notification that Graybar cancelled Manfree in 1958 (Pl. Ex. Nos. 536A and 536C), and it refused to sell to Manfree, following the latter's 1960 request and thereafter. (Pl. Ex. Nos. 538 and 547). Mr. Wichman, Vice President of G.E. and Manager of its Hotpoint Division, visited San Francisco in 1958 (Tr. 3065-3068), the same year as the Palace Hotel breakfast meeting in which Graybar announced to the San Francisco retailers a change in its sales policy whereby it would no longer sell to discount stores. (Tr. 6120). It was customary for Graybar representatives to discuss franchising of discount stores with Hotpoint

representatives (Pl. Ex. No. 482); and for Hotpoint personnel to visit retail stores with Graybar personnel. (Tr. 3246-3248; 3254-3257). Hotpoint also maintained business forms from which it could ascertain the retail appliance dealer structure in every county in the United States. (Id.)

5. Both Maytag and Frigidaire admittedly completely owned their respective distributing arms, appellee Maytag West Coast (Tr. 3307, 3479-3482), and Frigidaire Sales Corporation (Tr. 4205-4208). Both companies refused to deal with Manfree: Frigidaire Division never made its products available despite requests (supra, pages 49, 56-57, 68), and Maytag also refused Manfree's requests. (Pl. Ex. Nos. 4164, 568). These manufacturers supplied the advertising funds and price lists containing retail prices to the distributor companies, (Tr. 3344, Pl. Ex. Nos. 1920, 338, 1901-1906), and were clearly able to supply Manfree with major appliances.

In summary, it is submitted that the Court below erred in not finding that there was substantial evidence upon which to submit this boycott case to the jury. Conscious and parallel refusals to deal were shown to exist from 1957 to 1964; Manfree was denied the leading brands of television sets during that period, and from March, 1959, it could obtain none of the leading brands of major appliances. The cancellation and/or denial of these leading brands from the period of 1957 to 1959 adequately showed the concert of action directed against Manfree. The fact that these cancellations were not exactly simultaneous does not detract from the parallelism (see Standard Oil Co. of California vs. Moore, 251 F.2d 188,



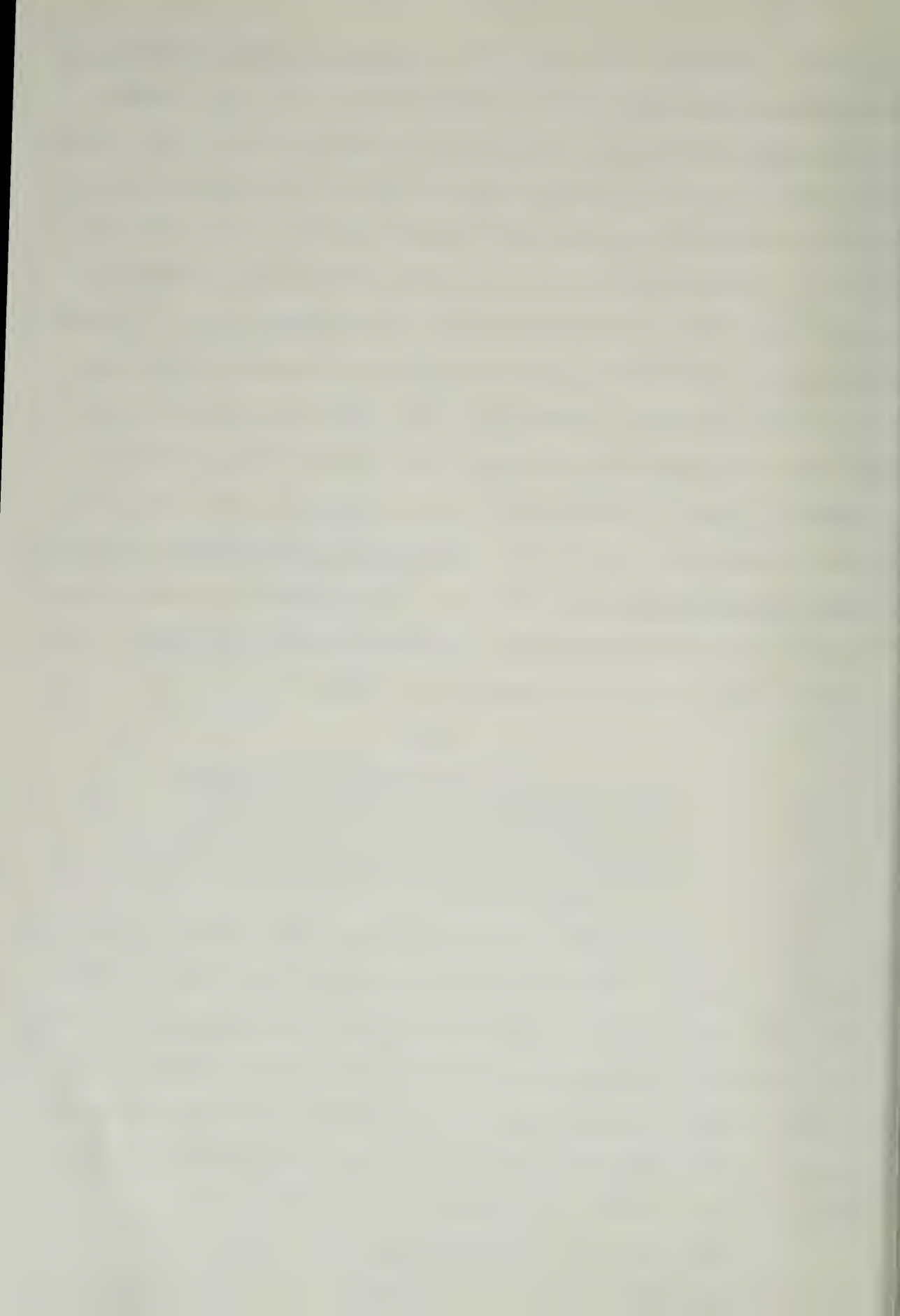
196-204, 205-211 (9th Cir. 1957); Bordonaro Bros. Theatres vs. Paramount Pictures, 176 F.2d 594, 596-597 (2nd Cir. 1949); Interstate Circuit Inc. vs. United States, 306 U.S. 208 (1939)); it equally shows the reluctance of some of the vendors to cancel a successful account with future potential, or the decision of a conspirator to accomplish its refusal to deal by allowing a franchise to expire at a subsequent date. In each instance, the vendor's cancellation was followed by an absolute and continuing refusal to deal. The fact that various parties interpose the defense of the right to unilaterally refuse to deal, does not take away a case from the jury, but simply makes it a jury case. Theatre Enterprises vs. Paramount Film Distributing Corp., 346 U.S. 537 at pages 541-542 (1954). Clearly the Court committed prejudicial error in these circumstances, in non-suited appellants' case.

VIII

THE COURT COMMITTED PREJUDICIAL ERROR
IN NOT ALLOWING APPELLANTS TO OBTAIN
JUDGMENTS BASED ON THE EXISTENCE OF
VERTICAL CONSPIRACIES TO RESTRAIN AND
MONOPOLIZE INTERSTATE TRADE AND COMMERCE.
(Specification of Errors III)

At the Court's direction appellants made an offer of proof in support of instructions to permit the jury to determine liability based on appellees' and co-conspirators' entry into vertical conspiracies, in violation of Sections 1 and 2 of the Sherman Act; (and based an attempt to monopolize such trade, in the violation of Section 2 of the Sherman Act, by co-conspirator Hale). (R. 1481).

The Court in its Pre-Trial Order dated August 13, 1960 (R. 1608-1609), limited the issues to be tried solely to



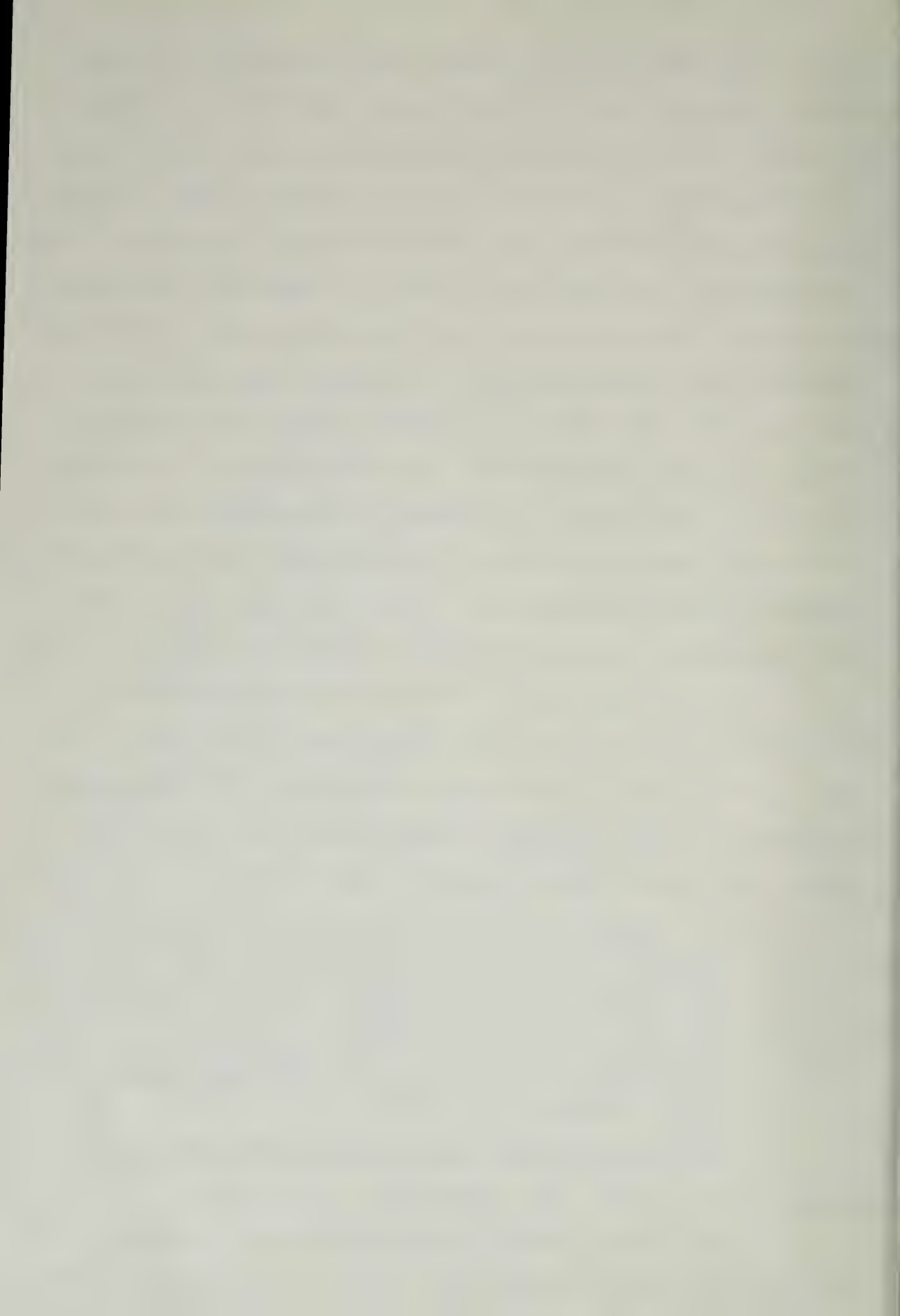
a horizontal conspiracy to boycott the plaintiffs, in violation of Sections 1 and 2 of the Sherman Act. In so limiting the case, the Court prevented appellants from proving or seeking recovery upon a vertical conspiracy between Hale or other retail dealer defendants, and each individual distributor named as a defendant, and each manufacturer so named who manufactured the product line sold by each such distributor; to (i) fix and maintain retail prices, and (ii) to boycott appellants pursuant thereto. The complaints clearly charged the existence of these vertical conspiracies. See Paragraphs 7a, 7b and 10. (R. 1, 8-11; 15, 20-24). In Answers to Interrogatories from defendants, appellants clearly informed them that they were alleging vertical conspiracies. (See, for instance, R. 964-965). Appellants' Pretrial Statement made it an issue (R. 1694).

It is respectfully urged that the Court erred in limiting the theories upon which appellants could obtain judgment, in the face of the charging allegations. In Continental Ore Corp. vs. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Supreme Court stated, at page 790:

"Petitioner's complaint did not preclude reliance on unilateral monopolization and the evidence offered was relevant and material to such charge. The trial court's misinterpretation of the law in the defining 'monopolization' and 'attempted monopolization' in terms of 'conspiracy to monopolize' was therefore prejudicial rather than harmless. This error should not be repeated in a new trial."

See, also, Philco Corp. v. Radio Corporation of America, 186 F. Supp. 155, 159-160 (E.D. Pa. 1960).

The record spells out the substantial evidence by which the jury could conclude that the lines manufactured and



distributed by the vendor appellees were sold to the defendant retailers on the basis of such retailers agreeing to follow the list prices of the vendors in the advertising and tagging of their retail prices on the products involved.

All of these companies did business on the basis of suggested list prices. This is admitted, except that Frigidaire claims that it did not utilize retail list prices after 1961, and Hotpoint claims it did not promulgate list prices to distributors. (But see Pl. Ex. for Id. No. 5050). R.C.A. and Whirlpool were clearly shown by substantial evidence to have promulgated their retail list prices to distributors, and to have been aware of Meyer's utilization of cooperative advertising policies under which a dealer was required to follow retail list prices. (Pl. Ex. for Id. No. 1161). The Meyer salesman, Mr. Erickson, testified that his dealers by and large tagged this merchandise at suggested list price (Tr. 4853-4857). Whirlpool, as stated before, was shown to have knowledge that the San Francisco market was a "high margin" market, because of the demands of certain large retailers there. Hale was identified in the record as a "key account" with Whirlpool. (Supra, pages 39-40).

Hotpoint's distributor, Graybar, clearly utilized list prices (Pl. Ex. Nos. 339, 340).

Thus, even assuming, arguendo, that the evidence did not warrant a finding of a horizontal conspiracy, it is clear from the evidence that appellees were participants to a vertical price fixing program whereby the distributors and manufacturers did not sell to discount stores in San Francisco, and



specifically to appellants, pursuant to an attempt to fix advertised and tag prices in the San Francisco retail market as to major appliances and television sets. Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra, at page 790. Such vertical conspiracies are illegal per se. In United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856 (1967), the Supreme Court held that the promulgation of a vertical plan to prevent distributors or retailers from selling to discount stores or mass merchandisers constituted a per se violation of the Sherman Act when title to the goods was shown to have passed to these distributors or retailers. This is so whether or not the restrictions are by explicit agreement or by silent combination. (Id. at pages 1864 and 1867).

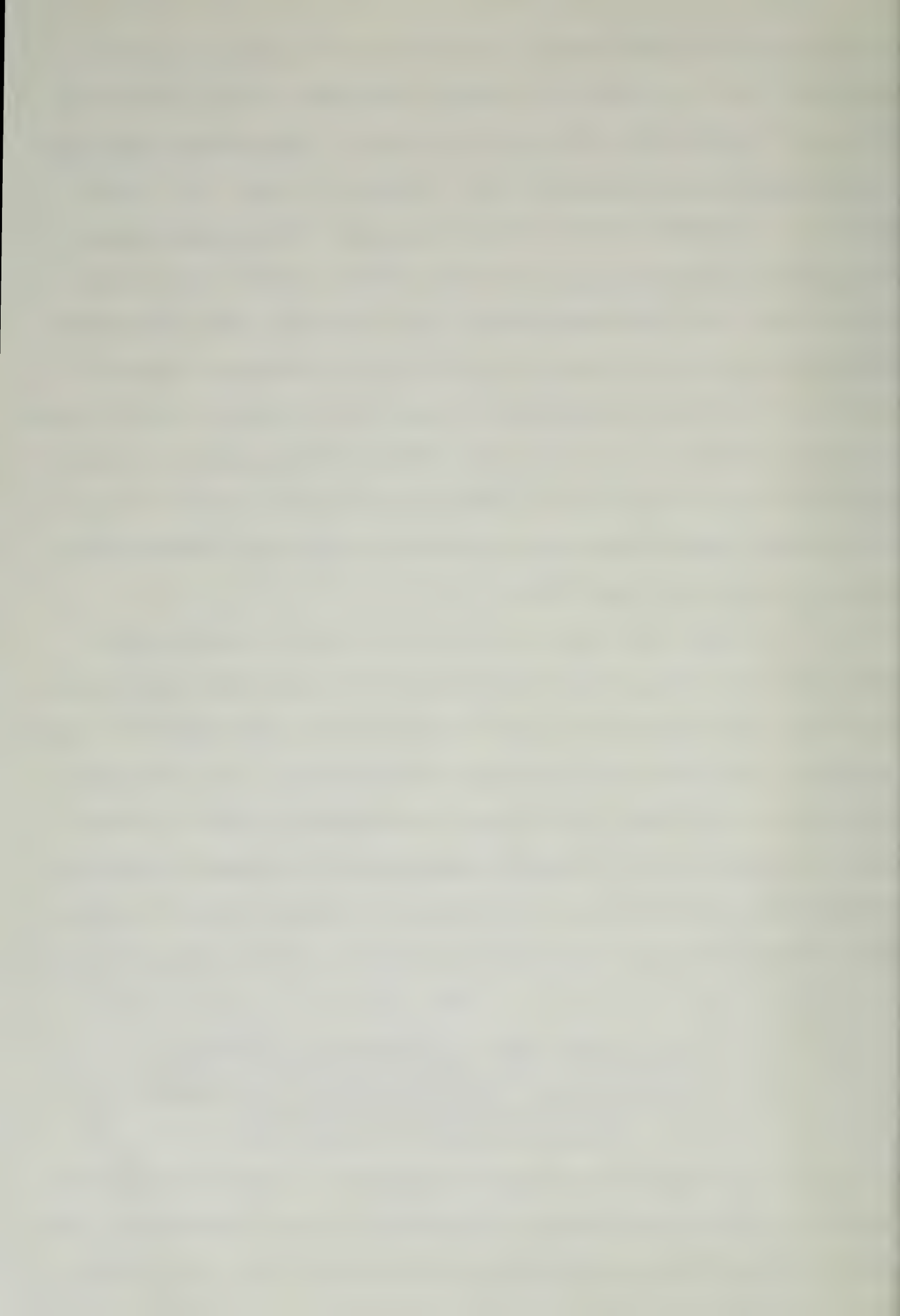
Here the record shows such a silent combination. The products of appellees were subject to specified list prices, and only those dealers in San Francisco who advertised or tagged at list price were able to sell the products. It is respectfully submitted that the proper enforcement of the antitrust laws does not allow vertical combinations to escape liability where these combinations are alleged to exist, simply because the conspirators are also participants to a horizontal conspiracy.

IX

THE COURT ERRED IN ORDERING A SEPARATE
VERDICT ON THE ISSUE OF LIABILITY BEFORE
ALLOWING THE JURY TO CONSIDER THE AMOUNT
OF DAMAGES SUFFERED BY APPELLANTS.

(Specification of Errors II)

A businessman whose enterprise is endangered or damaged by the acts of others in violation of the Sherman Act, and who therefore seeks protection under Section 4 of the Clayton



Act, is entitled to his full day in Court. This day in Court consists basically of showing the injury to plaintiff's business and the damages incurred by reason of the conspiracy in restraint of trade.

It is respectfully urged that the trial court erred in treating this private antitrust case differently from any other action for damages. The central issues in any liability case are how much the complainant has been injured by reason of the defendant's wrongful conduct. If enforcement of the antitrust laws is to rely upon private litigation as Congressional policy seeks (Olympic Refining Company vs. Carter, 332 F.2d 260, 26 (9th Cir.1964)) the private litigant should not be subjected to bifurcated trials as an addition to the series of hurdles the plaintiff must overcome. Burdens are not to be added to private antitrust actions, beyond what is specifically set forth by Congress in the antitrust laws. Radovich vs. National Football League, 332 U.S. 445, 454 (1957).

Further, damages cannot logically nor fairly be separated from the trial of the existence of a violation: "One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage." Haverhill Gazette Co. vs. Union Leader Corp., 333 F.2d 798, 802 (1st Cir. 1964), cert. den., 379 U.S. 391 (1965). Showings of damage are relevant to the proof of violation: the decrease in sales by the complainant, and its showing of a profitable business turned into a losing business by the impact of a boycott, though evidence of a financial nature, tends to show there is a conspiracy in operation, rather than supposed ineptitude of the plaintiff's



business. It is respectfully urged here as in United Air Lines vs. Weiner, 286 F. 2d 302, 306 (9th Cir. 1961), that the "question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which could amount to a denial of a fair trial."

X

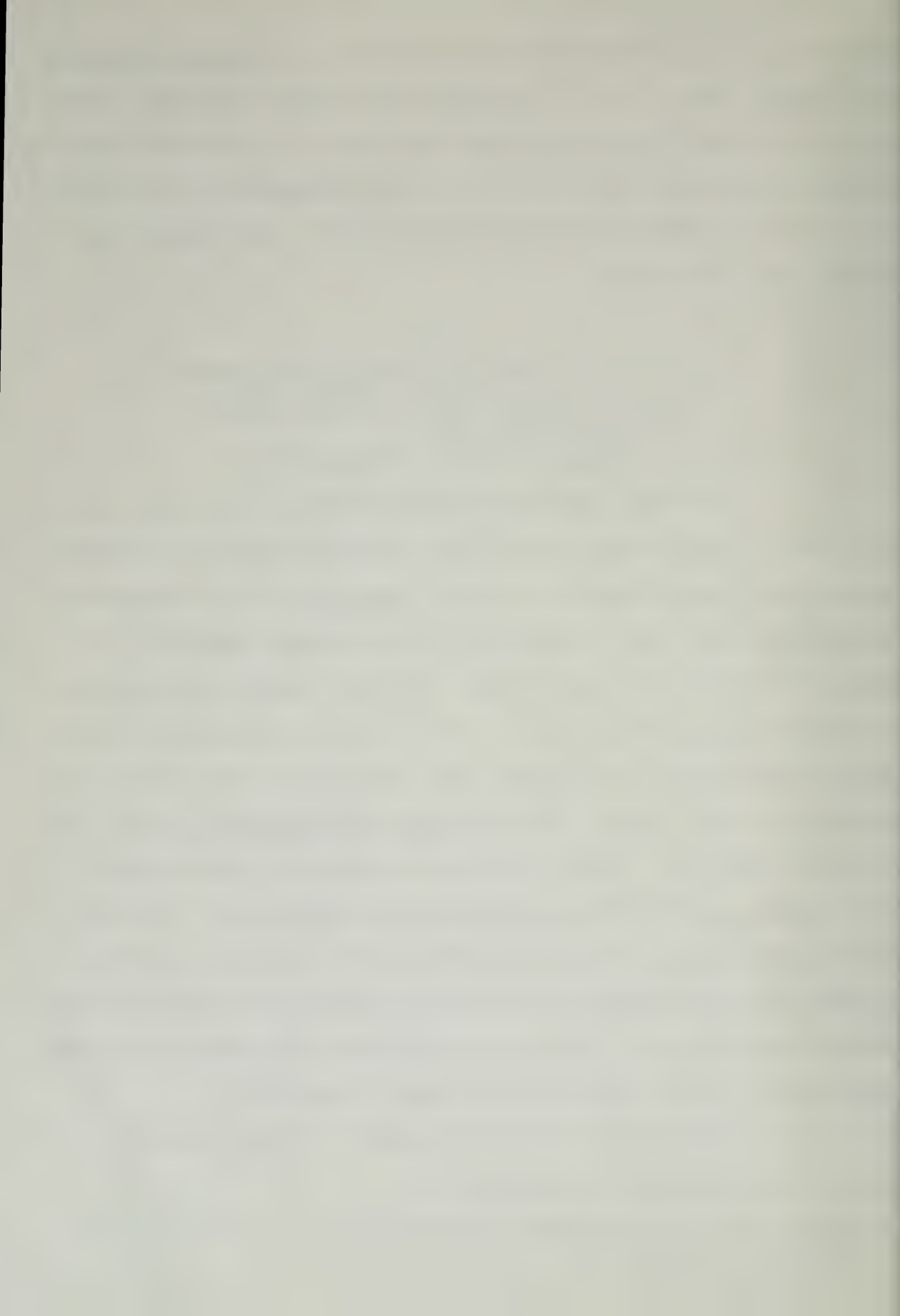
THE COURT COMMITTED PREJUDICIAL ERROR
IN DISMISSING APPELLEE NORGE SALES
FROM ACTION NO. 42674 ON ITS MOTION
IN SUMMARY JUDGMENT.

(Specification of Errors IV)

The Court dismissed appellee Norge Sales from Action No. 42674 on the basis that it had not been joined as a party within four years from the alleged beginning of the conspiracy. Norge Sales was made a defendant in the second complaint on August 4, 1964. The Court ruled that the Clayton Act statute of limitations, 15 U.S.C.A. § 15(b)^{8/} required appellants to sue Norge Sales within four years from the time the conspiracy commenced to their injury. See Garelick vs. Goerlich's Inc., 323 F.2d 584 (6th Cir. 1963). But the situation in this case is that appellants did commence an action alleging the existence of the conspiracy within four years of the time it commenced to injure them, and merely added an additional conspirator (Norge Sales) who allegedly injured them through acts done within four years prior to the filing of the second complaint.

The question of the liability of Norge Sales to

^{8/} Section 4b of the Clayton Act (15 U.S.C.A. § 15(b)) is set forth in Appendix D.



appellants was raised by Borg-Warner in its Answer filed November 8, 1960. (R. 80, 81-82). Borg-Warner itself claimed that Norge Sales, its wholly-owned subsidiary, should have been named as a defendant. (R. 197-200, 222-224). Appellants were entitled to sue any parties they believed to have been parties to the boycott conspiracy, and these parties are liable to appellants for any acts done pursuant to the conspiracy which caused them injury any time within four years prior to the time such defendants were made parties to the action. Flinkote Company vs. Lysfjord, 246 F.2d 368, 394-396 (9th Cir. 1957).

The injured party may always name as defendants the members of the conspiracy who are liable to it. Marino vs. United States, 91 F.2d 691 at 696 (9th Cir. 1937). The joinder of a party to a conspiracy suit does not create a new conspiracy, and does not change the status of the other conspirators. The new member is as guilty as if he were an original conspirator. United States vs. Borden Co., 308 U.S. 188, 202 (1939); United States vs. New York Great Atlantic and Pacific Tea Co., 137 F. 2d 459, 463 (5th Cir. 1943), cert. den., 320 U.S. 783 (1943). The most Norge Sales could seek in this situation would be a special instruction limiting its liability to acts occurring four years prior to August 4, 1964. But, it is respectfully urged, it clearly was not entitled to a dismissal based upon the statute of limitations provision of the Clayton Act.



EVEN ASSUMING THAT THE TRIAL COURT DID NOT ERR IN NON-SUITING APPELLANTS UPON THE EVIDENCE ADMITTED, IT COMMITTED PREJUDICIAL ERROR IN THE EXCLUSION OF ADMISSIBLE, RELEVANT AND MATERIAL EVIDENCE OF A SUBSTANTIAL NATURE OFFERED BY APPELLANTS IN SUPPORT OF THEIR CASE.

A. The Trial Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of California Electric In The Conspiracy To Boycott Appellants:
(Specification of Errors V,A,1.)

1. Mr. Joseph Valenson, the Sales Manager of appellee California Electric during the period when the boycott conspiracy was instituted and maintained (Tr. 3689-3700), admitted that his company because of its activities was liable to the appellants; but the Court erroneously excluded evidence of this admission. It is well-established that the admissions of liability of a general manager of a party defendant are admissible against it in a conspiracy trial. Moran vs. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 472 (3rd Cir. 1950); Continental Baking Company vs. United States, 281 F.2d 137, 149-150 (6th Cir. 1960); Flinkote Company vs. Lysfjord, 246 F.2d 368, 385-386 (9th Cir. 1957). Mr. Rising, the General Manager of California Electric (Tr. 6664), testified that responsibility for supervising the company's salesmen in the San Francisco territory was delegated to Valenson (Tr. 3692). He also testified that Mr. Valenson would conduct the meetings for sales personnel (Tr. 3739-3740); that the decisions as to the availability of advertising funds for dealers came under Valenson's jurisdiction (Tr. 3751); and that it was customary in the business affairs of the company for Valenson to approve advertising

proposals with retail dealers (Tr. 3753-3754). Pl. Ex. Nos. 665, and 1847-1898 identified Valenson as signator for appellee to documents approving advertising arrangements with Hale. The substance of the vital admissions made by Mr. Valenson to Mr. Freeman (and record references) have been set out in Specification of Errors, V,A,1. These were manifestly admissions against a party defendant made by its managing agent. It was reversible error to reject such admissions. Continental Ore Co. vs. Union Carbide & Carbon Corp., 370 U.S. 690, 702-703 (1961); Moran vs. Pittsburgh-Des Moines Steel Company, supra; Flintkote Company vs. Lysfjord, supra; Johnson vs. Bimini Hot Springs, 56 C.A.2d 892, 902 (1943); Shields vs. Oxnard Harbor District, 46 C.A. 2d 477, 488 (1941).

The admissions of Mr. Valenson to Mr. Freeman not only were admissible against California Electric, but were also admissible against the other co-conspirators, under the well-known rule that after prima facie proof of a conspiracy, the act or declaration of a conspirator against his co-conspirators relating to the conspiracy, may be proved as an admission. Schine Chain Theatres vs. United States, 334 U.S. 110, 116-117 (1948).

The Court rejected appellants' offers of proof of the admissions of Mr. Valenson on the grounds that the statements were not shown to have been made in "furtherance" of the conspiracy, and were unduly "prejudicial." (Tr. 5863). But a statement made by a co-conspirator concerning acts which themselves reflect the execution of the conspiracy is admissible, although the actual making of the statement in no way "further" the conspiracy. It is sufficient for the purposes of admissibility



that the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or as being explanatory of acts done in furtherance of the objects of the conspiracy.

See United States vs. E. I. DuPont de Nemours Co., 107 F. Supp.

324 (D.Del. 1952), at page 325, where Judge Leahy stated:

"1. A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties (citing cases). duPont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself in 'furtherance of the conspiracy'. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or is explanatory of acts done in furtherance of the objects of the conspiracy (citing cases). Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy..." (Emphasis added.)

Clearly the statements to Mr. Freeman by Mr. Valenson that he was expected by his company to give false testimony about this case, and that Mr. Muntain, California Electric sales representative, had given false testimony, were statements explaining acts in furtherance of a conspiracy, including the suppression of evidence pursuant thereto. It is clear that there was sufficient basis to allow the admissions of Mr. Valenson into evidence under the co-conspirator rule. /

Among Valenson's statements to Mr. Freeman was an admission that "plaintiffs had a \$1,000,000.00 lawsuit". This statement should have also been admitted as impeachment of witnesses such as Mr. Rising, another managing agent of California Electric (Tr. 3664), who denied that any retailer, distributor

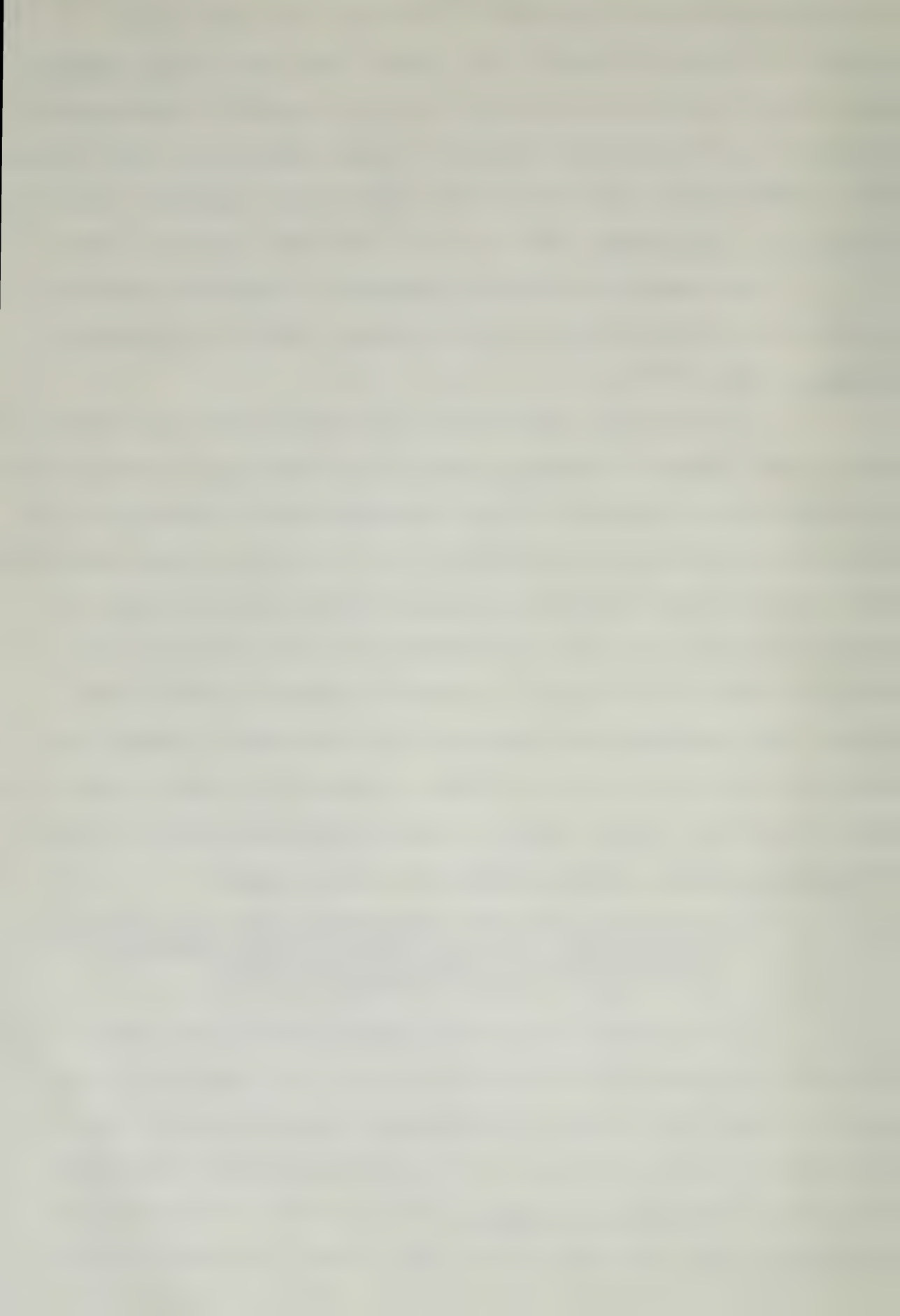
or manufacturer ever suggested or directed that California Electric not sell to Manfree (Tr. 3865). The plea of nolo contendere in antitrust cases provides a similar example: although not admissible as evidence of liability (under Section 5 of the Clayton Act), such evidence may be used for impeachment purposes. (See Pfotzer vs. Aqua System, 162 F.2d 779, 784-785 (2nd Cir. 1947).)

An attempt to corrupt a witness, or suppress evidence, constitutes as admission against the party. Witkin, California Evidence, §513 (1966).

2. The Court erroneously excluded Mr. Rising's admission that it was "general industry practice" to only allow retailers to have advertising credits if they advertised at the factory's list price (see Specification of Errors V, A, 2.) This witness testified that it was general industry practice for the manufacturers of major household appliances and television sets to utilize cooperative advertising funds, in order to maintain retail list prices. This evidence was excluded (Tr. 3813-3814). Clearly such testimony was relevant to the issue of concert of action, and is the type of evidence deemed properly admitted by this Court's decision in Standard Oil Co. of California vs. Moore, supra.

B. The Court Committed Prejudicial Error In Excluding Evidence That Borg-Warner Participated In The Conspiracy To Boycott Appellants:
(Specification of Errors V, B.)

1. The Court erroneously struck Borg-Warner Exhibit No. 9024 (see Specification of Errors V, B, 1.) Appellee voluntarily offered this exhibit in evidence, thereby constituting a stipulation by its attorney as to its admissibility, binding on that party. See Wilson vs. Mattei, 84 C.A. 562, 572 (1927); and Buchanan vs. Nye, 128 C.A. 2d 582, 585 (1954). By striking this



evidence upon a later change of mind by appellee, the District Court ignored evidentiary law and took sides with the appellees. It was favoritism for the Court to permit Borg-Warner to withdraw this exhibit; then deny appellants the right to fully examine witness Mr. Vern Brown, on the ground that the full scope of Mr. Brown's prospective testimony was not set forth in appellants' pre-trial listing of witnesses and their testimony. See infra, and Specification of Errors V, C, 4.) Clearly, one wishing to object to the admissibility of evidence waives the right to do so by failing to make a timely objection. McCormick, Evidence, § 52 (1954). Here, at the time the exhibit was introduced, appellee not only made no objection, it actively sponsored the introduction. And, where one party so elicits the evidence himself, or volunteers its introduction into evidence, he waives all objections to its use, and cannot thereafter move to have such evidence stricken. Estate of Schulmeyer, 171 Cal. 340, 345 (1915); People ex rel. Dept. of Public Works vs. Glen Arms Estate, Inc., 230 C.A.2d 841, 850 (1964).

2. The Court also erred in excluding appellants' Exhibits Nos. 431, 3006, 3007, 3022, 3024, 3026, 3029, 3030, 3032, 3036 and 3037, proving the establishment of a fixed and rigid market system by the manufacturers of major household appliances, and clearly evidencing the motive of these major companies to aid and assist in the control by retailers of entry into the San Francisco market (as a "list price" market). (See Specification of Errors, V, B, 2 and 3.)

Borg-Warner, G.E., Frigidaire, Whirlpool, and Hotpoint were shown, by this evidence, to be working together at management

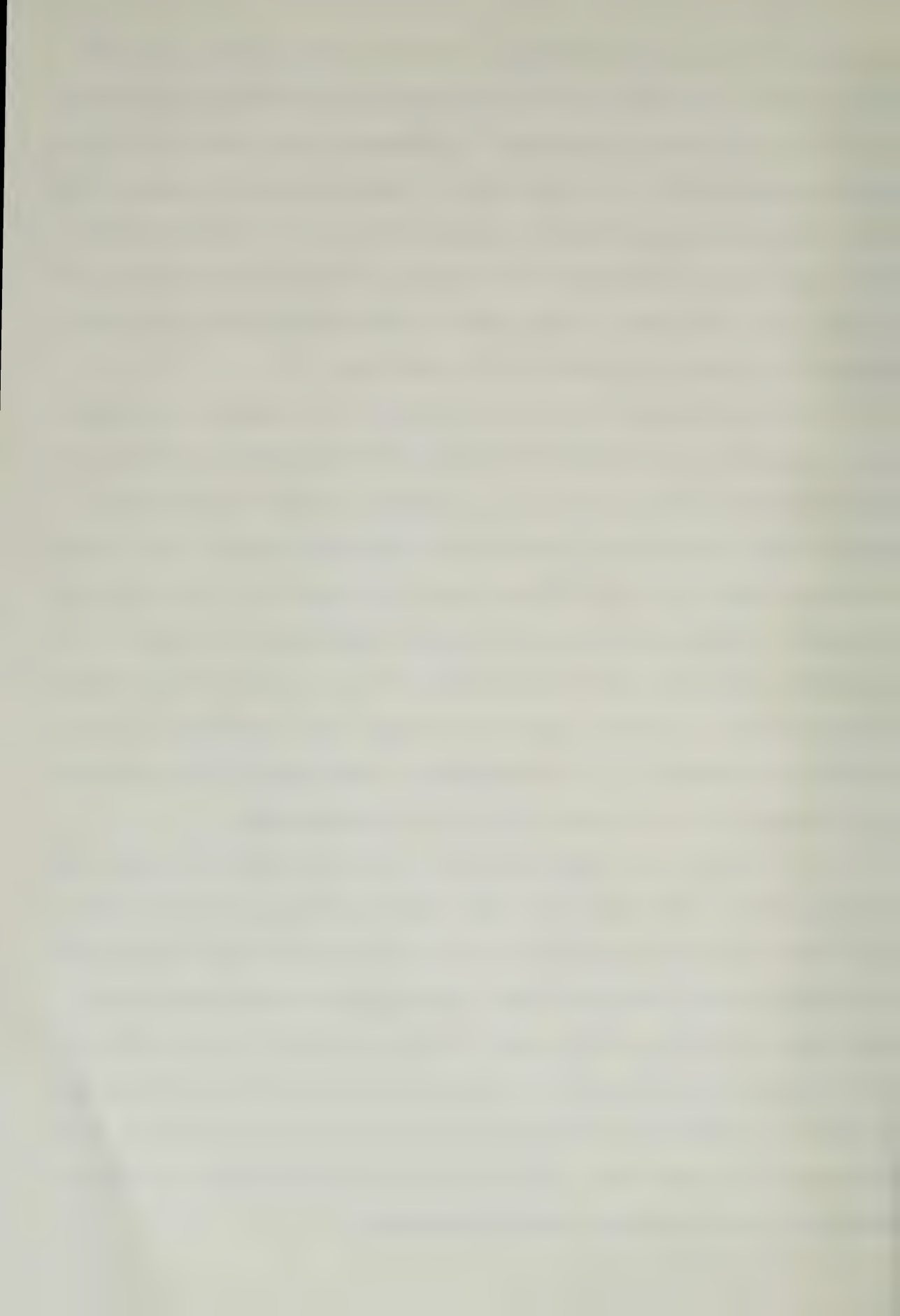
level to establish a fixed distribution system throughout the country, clearly contemplating the enforcement of their retail price policies on distributors (see Pl. Ex. for Id. No. 431, as Appendix B hereto). Appellants began their case by proving an agreement by the defendants to establish published "list prices" as the advertised retail prices in the market. Borg-Warner and the other major appliance manufacturers were working on this goal (R. Ex. for Id. No. 431, supra). This evidence shows that the management representatives of manufacturers of major electrical appliances and home laundry equipment met together and discussed the enforcement of a single price system, and a fixed and rigid distribution market throughout the United States. This was after the well-publicized indictment of leading electrical system producers in Philadelphia for price-fixing. Such exhibits graphically demonstrate that these manufacturers had the purpose, and motive, to enforce retail list prices as a group: to assist a local conspiracy to boycott retailers (like Manfree) who didn't follow list prices and thereby threatened to destroy the very functioning of the list price program as an effective market control tool; and that they were working together as an industry in establishing joint policies controlling retailer advertising and prices. It was error to exclude this evidence. Standard Oil Co. of California vs. Moore, supra; Continental Ore Corp. vs. Union Carbide & Carbon Corp., supra.

3. The Court erred in excluding evidence of the intent of Borg-Warner to boycott appellants (see Specification of Errors, V, B, 5 and 6.) Borg-Warner attempted to explain the significance of the meeting between Mr. Bull and representatives

of its affiliated distributors, Lancaster and Graybar, at the Villa Hotel, described before, as merely a meeting to determine who would pay "service charges" on transshipped Norge appliances under Borg-Warner's warranty policy. Appellants, however, urged that the meeting was held to discuss what to do about Manfree obtaining Norge appliances through Mr. Green and Graybar in Los Angeles. Pl. Ex. for Id. No. 4028 clearly shows that this was indeed the primary purpose of the meeting.

The testimony of Mr. Green that Mr. Bonnet of Graybar (who attended the meeting) threatened to stop selling Norge appliances to Mr. Green for his own store, showed the extent to which these conspirators would go to prevent Manfree from obtaining Norge appliances and to maintain the boycott. This conduct is clearly unwarranted pressure upon a retailer, and permits the reasonable inference of the existence of an unlawful undertaking and enterprise. It was error to exclude such testimony, since it was a statement of a co-conspirator made during the existence of a conspiracy, and aimed directly at appellants.

4. It was error for the Court to exclude Pl. Ex. for Id. Nos. 1922, 1923 and 3095 (see Specification of Errors, V, B, 4.) These exhibits established that Borg-Warner had full notice that distributor Lancaster was following its Norge Division's list price schedule in the San Francisco market. Such evidence thus disproved the defense of Borg-Warner (R. 1950, 1962) that it did not direct its Northern California distributor in matters of pricing by retailers, and advertising by retailers under advertising fund programs run by Lancaster.

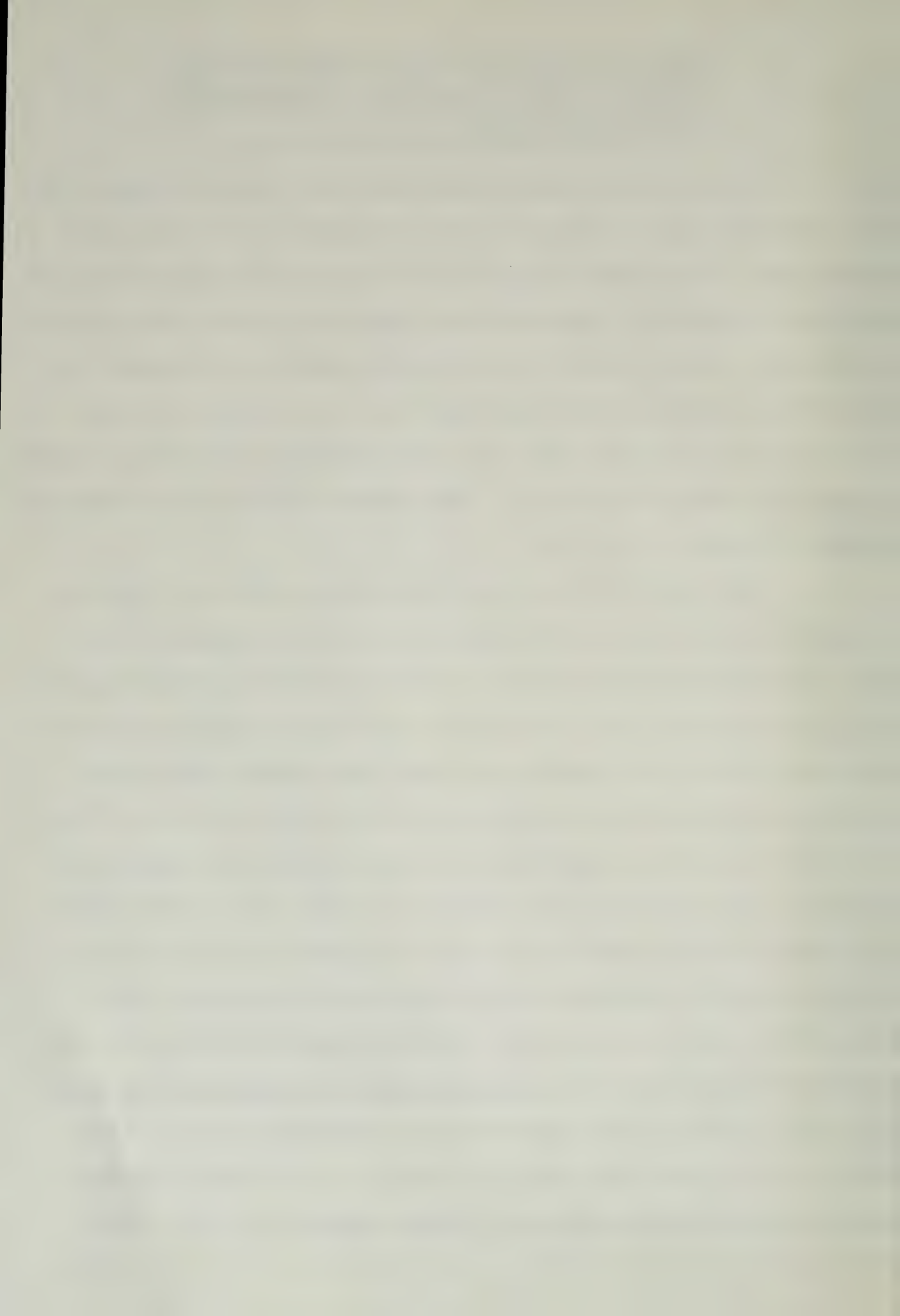


C. The Court Committed Prejudicial Error In Excluding Evidence Proving That G.E. And Hotpoint Participated In A Conspiracy To Boycott Appellants:

(Specification of Errors, V, C.)

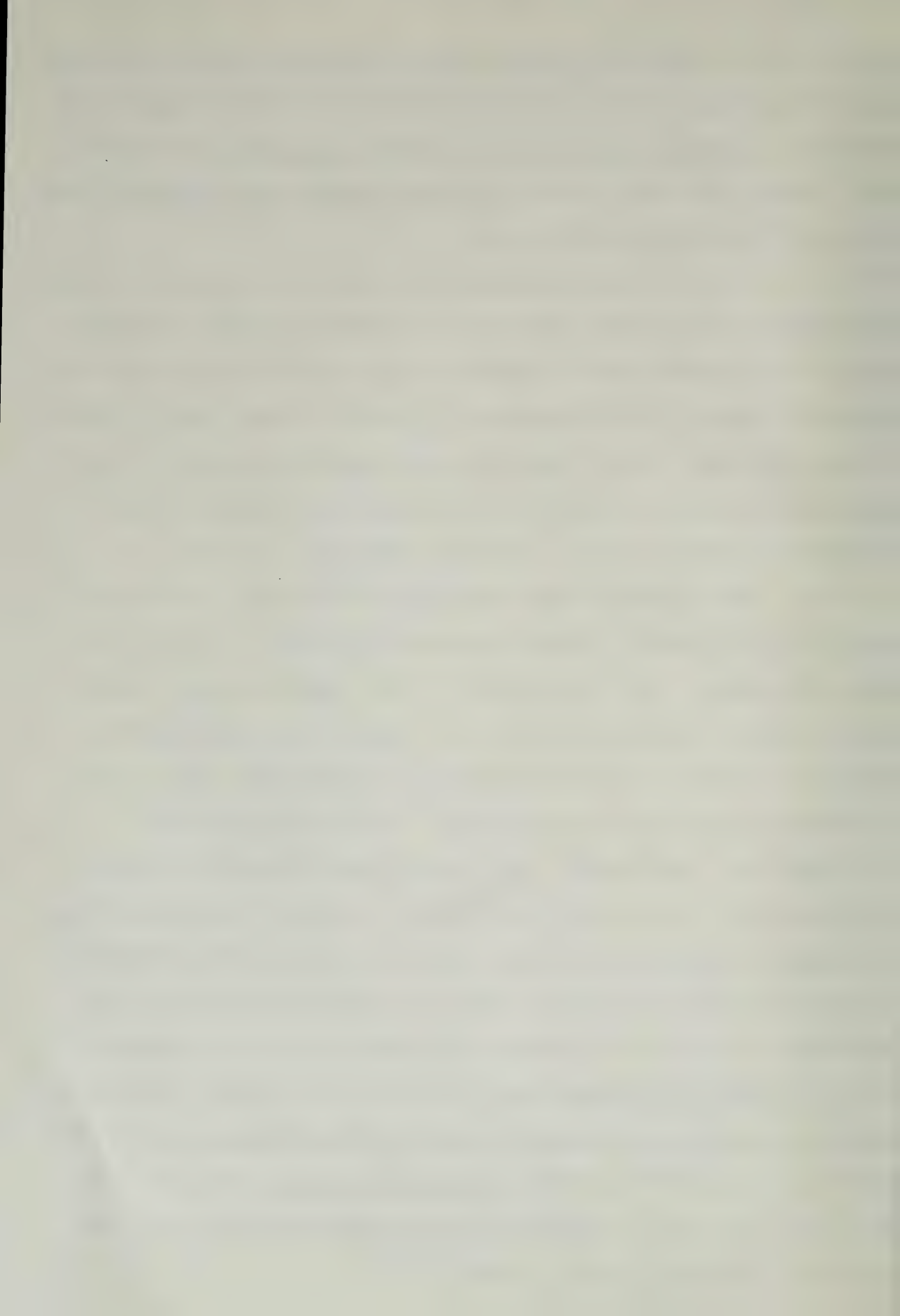
1. The Court erroneously excluded direct evidence that G.E. admitted that its dealers did not engage in retail price competition in San Francisco; that it maintained schedules of the particular brands of appliances and television sets being carried by discount stores in San Francisco, San Jose, and Oakland; and that it only agreed to sell its products to a large discount store chain in the East Bay area (White Front), after Hale ceased to sell the subject products. (See record references at Specification of Errors, V, C, 1.)

The claim of G.E. that there was no evidence that it required its dealers to advertise and sell at suggested list; that there was in fact city-wide selling of G.E. products at less than suggested list (R. 1956-1957), was directly contradicted by these exhibits. This evidence on its face proves appellants' contention that the large San Francisco dealers (like Hale) did not engage in price competition in advertising and tagging G.E. products, but followed list prices. (Pl. Ex. for Id. No. 5033). The Court excluded this evidence on the ground that the documents pertained to White Front and were thus irrelevant (Tr. 5258, 5266); but the documents contained statements of G.E. representatives referring to retail competition conditions in San Francisco, which is the gravamen of an antitrust case of this kind. It was reversible error to exclude this basic evidence. Continental Ore Corporation vs. Union Carbon & Carbide Corp., 370 U.S. 690, 702-703 (1963). Such evidence was also obviously



relevant and material as part of the overall picture of the conduct of appellee in the particular market, and should have been admitted. Standard Oil Co. of California vs. Moore, 251 F.2d 188, 205-210 (9th Cir. 1957); Flinkote Company vs. Lysfjord, 246 F.2d 368, 375-376 (9th Cir. 1957).

2. The Court improperly excluded the testimony of Mr. Vern Brown, former sales manager of Graybar, offered by appellants, that Graybar had to cease selling Hotpoint appliances to discount stores in San Francisco, in order to sell such products to Hale and other large department and appliance stores in the market area; and was required to discuss this decision with Hotpoint representatives. (See Specification of Errors, V, C, 3 and 4.) This evidence was excluded on the basis that appellants did not properly summarize such testimony in their Pre-trial Statement. (Tr. 6065-6070). But, appellants put appellees on notice before trial that Mr. Brown was a potential witness (R. 1367), and such testimony was directly related to the matters set forth in appellants' Pre-trial Statement. (R. 1086-1087, 1485-1486). The trial court therefore abused its discretion in refusing to allow Mr. Brown's vital testimony. Pre-trial procedures and rules should not be strictly construed or applied against the party offering evidence, but should be construed in favor of allowing a determination on the merits. Leh vs. General Petroleum Corp., 382 U.S. 54 (1966). See, also, Jones vs. Union Auto Indemnity Assoc. of Bloomington, Ill., 287 F.2d 27, 29 (10th Cir. 1961); Sher vs. De Haven, 199 F.2d 777, 782 (D.C. Cir. 1952); Clark vs. Pennsylvania Railway Co., 328 F.2d 591, 593-595 (1st Cir. 1964).



3. The Court erroneously excluded Pl. Ex. for Id. Nos. 4391, 4196 and 5052. (See Specification of Errors, V, C, 2). These exhibits showed that Hotpoint was in close contact with the local Hotpoint retailers through its field representatives; that it had exact knowledge who of the retailers were in Graybar's territory and what these retailers were doing in the retail market. In view of Hotpoint's defense that it had no knowledge or notice of the affairs of its distributor, or of the sales activities of Hotpoint dealers, or to whom Hotpoint appliances were being sold (R. 1959-1960), the evidence was certainly relevant and material. It was error to have excluded these exhibits.

D. The Court Committed Prejudicial Error
In Excluding Evidence Proving Partici-
pation By R.C.A. In The Conspiracy To
Boycott Appellants:

(Specification of Errors, V, D.)

1. The Court erroneously rejected evidence that proved R.C.A. enforced its list prices upon its distributors (see Specification of Errors V, D, 1, 2, 4, 8 and 9.) It excluded Pl. Ex. for Id. Nos. 343 and 344 on the ground that a sufficient foundation had not been laid for their introduction (Tr. 4552, 4719, 6389). However, these exhibits were listed in Plaintiff's Separate Listing of Documents Pursuant To Local Rule 4(10), at page 2 (R. 1533, 1535). R.C.A. responded to this list in the Statement of Radio Corporation of America With Respect to Plaintiff's Proposed Exhibits. (R. 1514). At page 5 in this statement, appellee made the following admissions:

"RCA further objects to the admission of any such price sheets or correspondence other

than price sheets published by RCA or correspondence emanating from RCA on the ground that such other price sheets and correspondence is hearsay as to RCA and on the grounds of lack of foundation for its admission." (Emphasis added) (R. 1518).

On August 4, 1964, an attorney for appellants received a letter from counsel for R.C.A. enclosing what now have been identified as Pl. Ex. for Id. Nos. 343 and 344 (among other documents). The attorney's letter clearly showed that Exhibits 343 and 344 emanated from the files of R.C.A. Under California Code of Civil Procedure § 1942 (now Evidence Code § 1414), and F.R.C.P. Rule 43a, a foundation has thereby been established, and the documents are admissible. This was pointed out in Plaintiffs' Memorandum In Support Of Plaintiffs' Exhibit Nos. 343, 344, 1846, 1842-1844 (R. 1757).

These exhibits showed R.C.A.'s knowledge of Meyer's suggested price policy, and further evidenced that the distributor and R.C.A. were in close and constant communication with one another. Exhibit 343 also showed that R.C.A. had knowledge that the San Francisco R.C.A. dealers (such as Hale and Sterling) intended to maintain their retail prices at retail list. The documents also demonstrate the ability of the appellee and co-conspirator manufacturers and distributors to obtain the price sheets of the other co-conspirators.

Discount stores are identified by R.C.A. in Exhibit 343 as a "cut-price operation". Exhibit 344 contains evidence contradicting the testimony of Mr. Sanford, a managing agent of Hale and Meyer, that Meyer's price sheets were not discussed with the factory (R.C.A. or Whirlpool). These documents are substantial evidence that R.C.A. possessed thorough knowledge

of the San Francisco market situation and the activities of its distributor therein. They were therefore relevant and material, and it was prejudicial error to exclude them.

Pl. Ex. for Id. Nos. 348, 5060, 5061 and 5070 show that R.C.A.'s sales, distribution and advertising programs and policies required direct contact by R.C.A. with retailers, through the distributors, and knowledge by R.C.A. of the manner in which its advertising dollars were being utilized by its retailers. Exhibit No. 348 specifically shows that R.C.A. knew that Meyer's distribution policy was against cut-pricing by retailers from the list price, and directly contradicts testimony given at the trial by adverse witnesses. (Tr. 1242, 1334, 4533-4546, 4685-4688, 4694, 4697-4701, 4711-4712, 4729-4737, 4740, 4744-4745, 4767-4769, 4786-4788; R. 1924, 1927-1928).

Of special importance is Exhibit No. 5068 showing that R.C.A. required retailers to sign affidavits with respect to comparison price advertising, allowing the inference to be drawn that appellee, through its field representatives and its principal office, sought to control local retail advertising. The requirement for these signed affidavits stemmed from the activities of the E.I.A., of which R.C.A. is a member, and show appellee's willingness to participate in common programs and plans affecting marketing, with other television manufacturers. This evidence bears particularly on the excluded testimony of Mr. Saxon, Vice President of R.C.A., to the effect that his company did not engage in price competition in the sale of television sets. It is logical and rational to conclude that a company seeking to control the type of advertising done

locally can also participate in establishing a local fixed retail market under which its suggested retail list prices are followed and maintained.

The Court excluded other evidence of R.C.A.'s establishment of a fixed and rigid distribution program. It ruled that appellants could not establish that R.C.A. sold its products directly to retailers in California through its wholly-owned subsidiary, R.C.A.-Victor Distributing Corp., and that this company and Meyer respected each other's exclusive territorial rights in Southern and Northern California, respectively. This territorial allocation directly affected Manfree, who requested television sets from both R.C.A. and R.C.A.-Victor Distributing, which requests were refused on the ground that the factory did not sell to retailers or that Manfree must obtain the products from the San Francisco distributor. Appellant should have been able to acquire R.C.A. sets from it in Los Angeles, but the fixed market shown to exist by this evidence, prevented such opportunity.

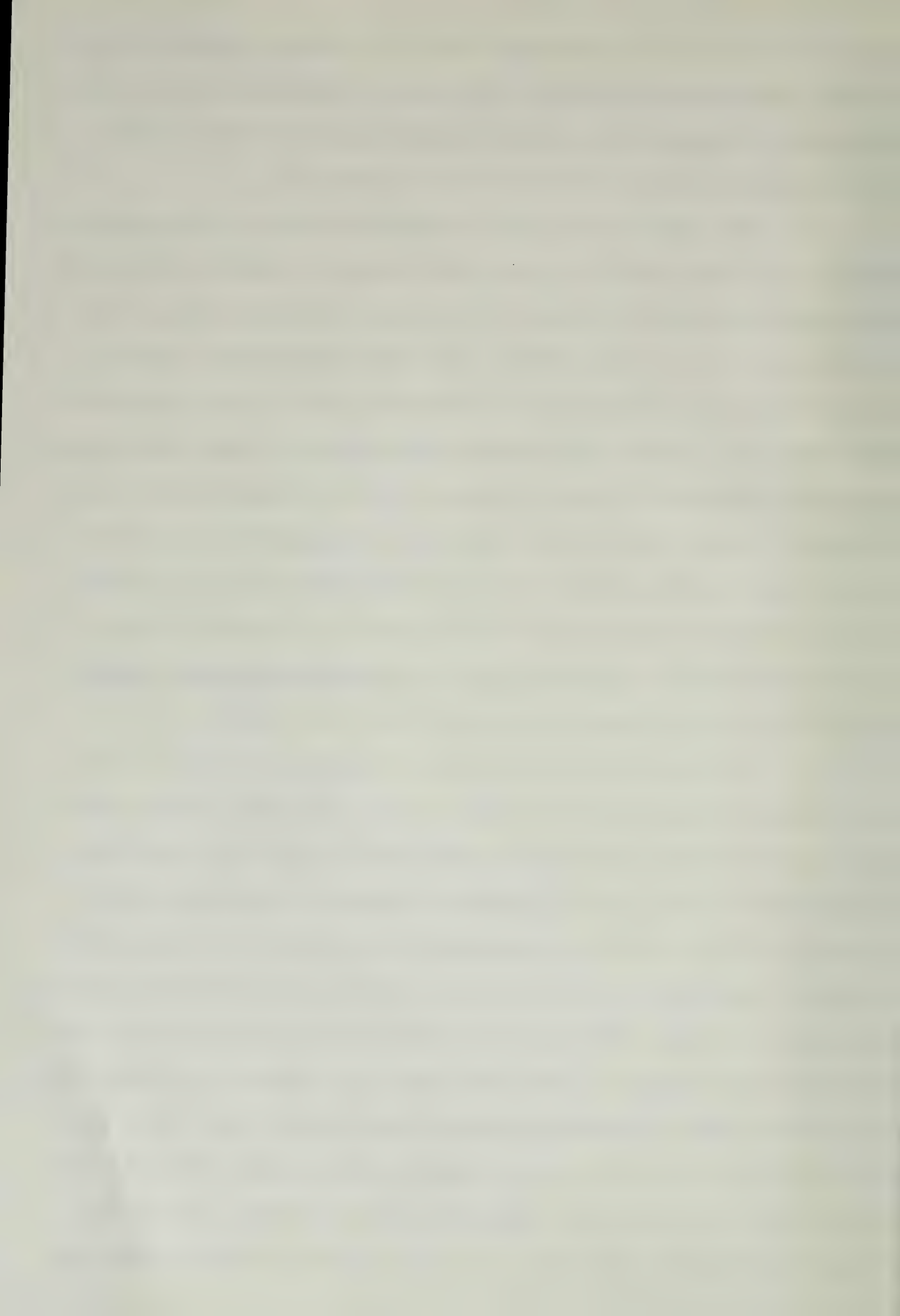
2. Evidence that R.C.A. had direct knowledge of the activities of and contact with Hale and Lachman Bros. was rejected (Pl. Ex. for Id. Nos. 780, 1159, 363, 364 and 365). This evidence should not have been excluded, as it bore directly on the question of R.C.A.'s ability, and desire, to be informed of local market conditions, as further proof of its participation in the conspiracy.

3. The Court erred by excluding evidence that R.C.A. received written protests from Meyer concerning the supplying from Chicago of R.C.A.-Victor television sets to Spiegel Outlet

Stores in California, through the R.C.A.-Victor Distributing Corp., because such products were being advertised in the San Francisco newspapers at prices below suggested list prices (see Specification of Errors, V, D, 6 and 7.)

The Court ruled that evidence of Meyer's demands to R.C.A., in 1958, that it take the necessary steps to stop the sale of such sets by Spiegel in the San Francisco area, was irrelevant. (Tr. 4416-4418). But the evidence was material and relevant to appellants' allegations that a plan existed in San Francisco County to prevent advertising of television sets at below suggested prices, pursuant to which Manfree was boycotted. It is relevant and material for appellants to show that other "price-cutters" had been the subject of a similar plan. Such was an important (and logical) holding in this Court's opinion in Standard Oil Co. of California vs. Moore, 251 F.2d 108, at pages 208 to 210 (9th Cir. 1957).

The proffered testimony of Mr. Maag of R.C.A. and Mr. Meyer of Meyer, and Pl. Ex. for Id. Nos. 783 and 784 were also relevant and material to show that R.C.A. had knowledge or notice of the plan to maintain prices on its television sets in San Francisco at suggested list price. Mr. Maag was a Vice President of R.C.A. at the time he received the protests from Mr. P. Henry of Meyer concerning the supplying of television sets to Spiegel. His testimony was relevant and material, and constituted admissions against appellee R.C.A. The deposition testimony of Mr. A.H. Meyer, and Exhibits 783 and 784, were communications addressed directly to R.C.A., which Mr. Maag testified he received. Clearly appellants were entitled



to show R.C.A.'s knowledge of this plan to maintain suggested prices, as reflected by Meyer's violent reaction to the Spiegel "below-list" advertised prices. Mr. Maag's testimony was to the effect that R.C.A. was informed that local retailers were exerting pressure because of these ads. Mr. Meyer's testimony was that local retail dealers returned R.C.A. television sets to Meyer, after the Spiegel ads appeared in the San Francisco newspapers, showing RCA television for sale at below list prices (Appendix A, page xxv). Such was circumstantial evidence of pressure by San Francisco retailers upon their vendors to maintain retail list prices, and it was clearly prejudicial to appellants to exclude this evidence.

E. The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Whirlpool In The Conspiracy To Boycott Appellants:

(Specification of Errors, V, E.)

1. The Court erred in excluding Pl. Ex. for Id. No. 1714, significantly showing that Mr. Sol Golden, Whirlpool's Sales Manager (headquartered in Chicago), personally brought Meyer's attention to Manfree's request to Whirlpool for the right to buy its products: Mr. Golden was shown to have participated in providing Hale with factory "key account" advertising money (Pl. Ex. No. 685A-C).

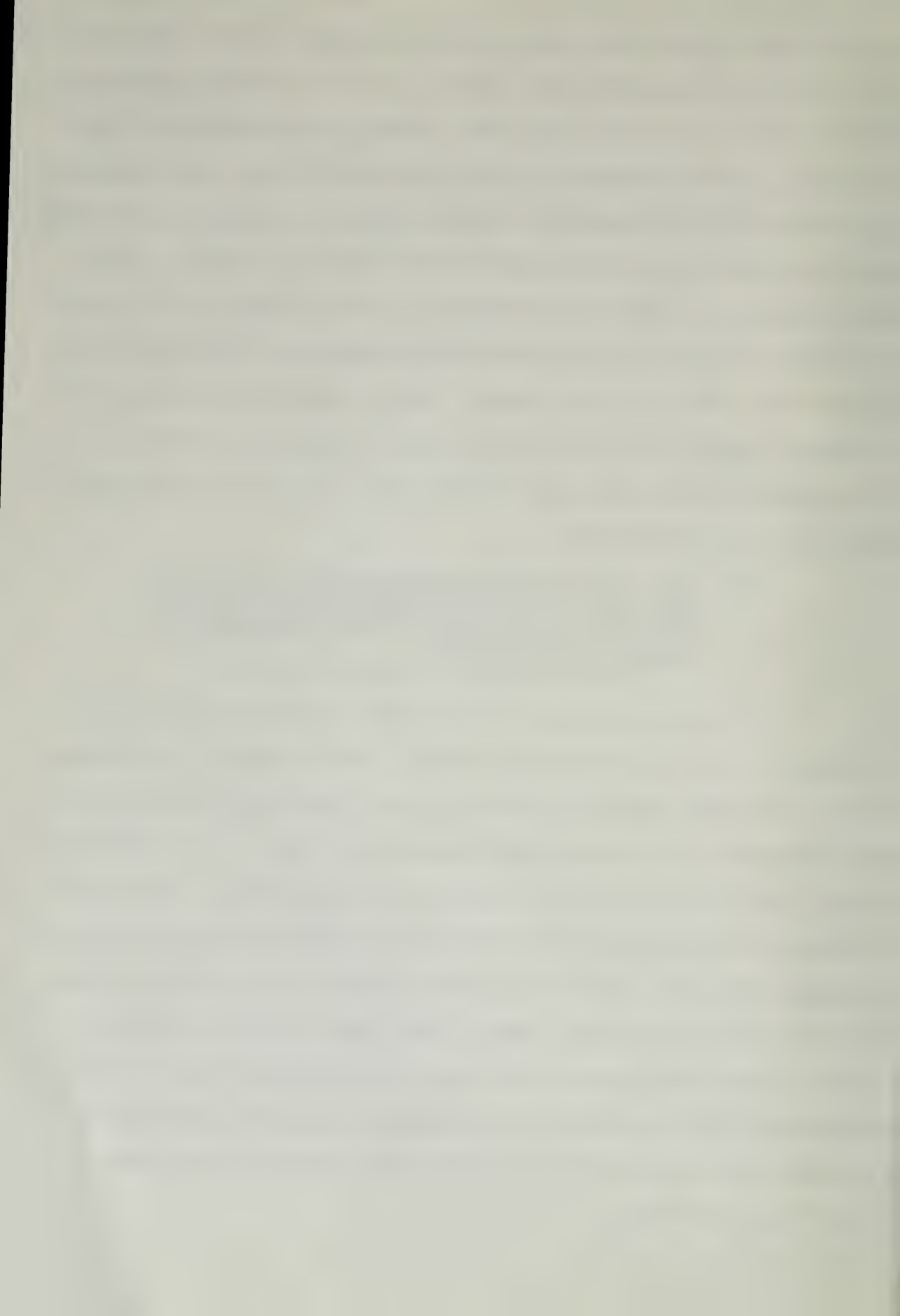
2. The corporate affiliation between R.C.A. and Whirlpool should have been admitted in evidence (the proof of common directorships; Pl. Ex. for Id. No. 5086). Whirlpool products are called "RCA-Whirlpool", and the evidence showed that R.C.A. officers were directors of Whirlpool. This corporate inter-relationship was evidence germane to appellants'

proof that Manfree not only could not obtain R.C.A. brand televisions from Meyer, but was equally unable to obtain Whirlpool brand major appliances from this common R.C.A./Whirlpool distributor. This evidence is also relevant in refuting arguments reflected in the Memorandum Opinion that the alleged conspiracy involved non-competitive products (R. 1912, at 1940). It is the tendency of companies engaged in the manufacture of major appliances to seek affiliation with companies that manufacture television sets, or vice versa. These companies are then in a position to sell a full line of major consumer products to distributors and retailers, which G.E., R.C.A., Westinghouse and Philco admittedly do.

F. The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Frigidaire In The Conspiracy To Boycott Appellants:

(Specification of Errors, V, F.)

Frigidaire contended at trial that it did not fix or establish retail prices after 1961. Yet its sales representatives discussed general market pricing with representatives of the retailers both before and after this time. (Tr. 4020-4023, 4050, 4104-4109, 4214-4215, 4299-4307, 4232-4234). The Court prevented appellants from introducing analysis of the prices of Lachman Bros. and Redlick to show uniformity of retail prices on Frigidaire products. See Pl. Ex. for Id. Nos. 4170 and 4178. Appellants should have been permitted to show by such evidence that Frigidaire's representatives discussed retail prices with retailers in San Francisco County, after 1961. (See Tr. 4100-4110).



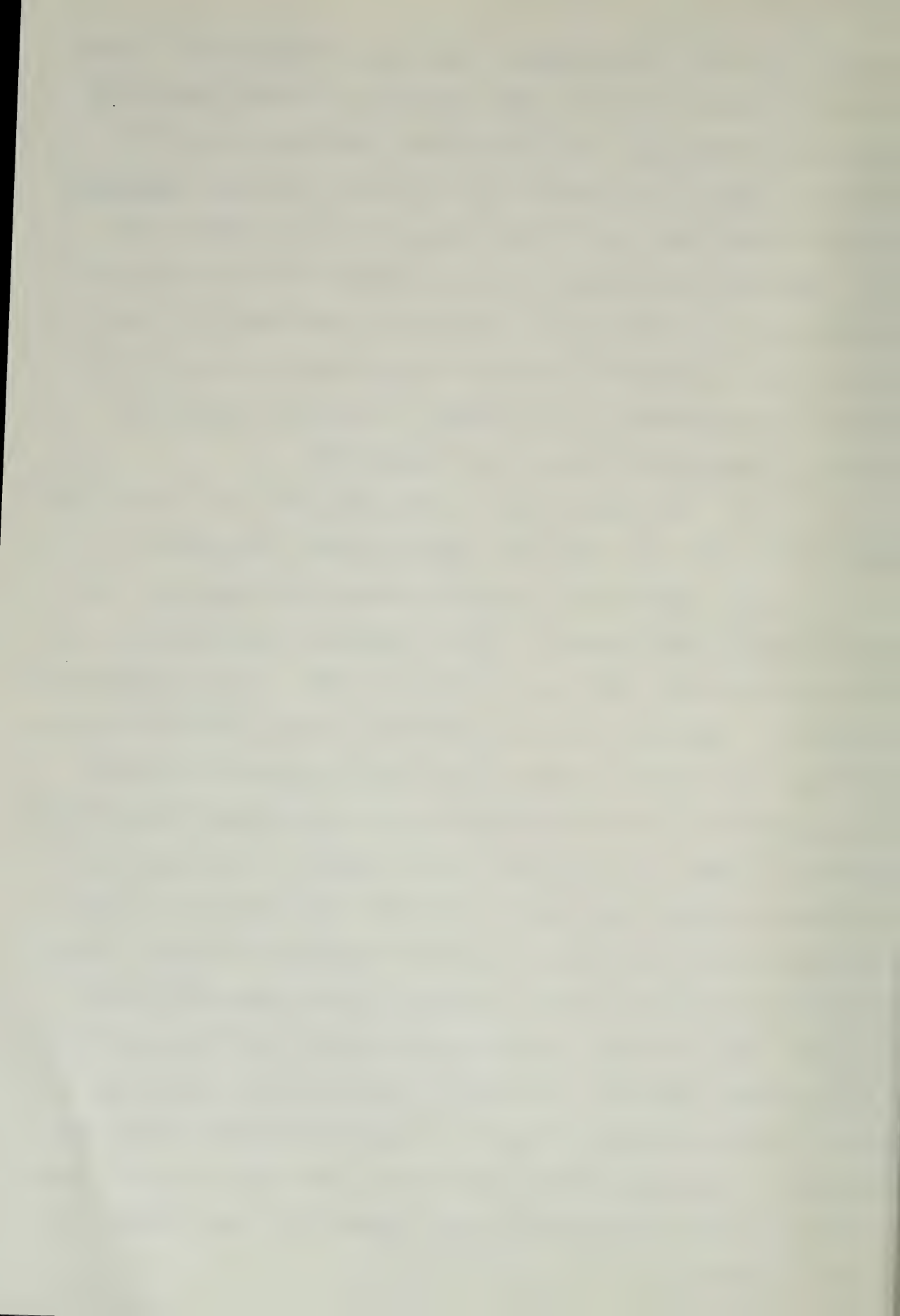
G. The Court Committed Prejudicial Error
In Excluding Evidence Proving The Par-
ticipation Of Maytag In The Conspiracy
To Boycott Appellants:

(Specification of Errors, V, G.)

1. The Court excluded evidence of the statement of Maytag's managing agent, Mr. Mitchel, that Maytag West Coast would no longer sell to Manfree because it was no longer going to sell Maytag products to discount stores in San Francisco, due to a change in policy (see Specification of Errors, V, G, 2.) The Court rejected this important evidence showing that Maytag felt and reacted to the anti-competitive pressure exerted by Hale and the other retail co-conspirators, and had to change its policies as to whom it would sell. The ground of rejection was that appellants filed interrogatory answers stating that Maytag had joined a conspiracy in April, 1959. (R. 728, 731; 958, 961; see Appendix A, page xxxi). But clearly evidence going to the purposes and the reasons for a refusal to deal are always relevant, and the trial court cannot set an arbitrary cut-off date for such evidence. Continental Ore Corporation vs. Union Carbide & Carbon Corp., 370 U.S. 690, 701-702, 709-710 (1962); Standard Oil Co. vs. United States, 221 U.S. 1, 75, 76 (1911); Kansas City Star Co. vs. United States, 240 F.2d 645, 650-651 (8th Cir. 1957). This testimony related to the alleged reasons why Maytag would not sell to Manfree, and therefore the reasons why it chose to participate in the boycott conspiracy. It is no answer then to say that an answer to interrogatories set a cut-off date as to time, especially as the interrogatory answer clearly indicated that Maytag was engaged in anti-competitive conduct prior to April,

1959. (R. 691). Furthermore, appellants stressed the importance of evidence of the large purchase of Maytag appliances by Hale in February, 1959, coincident with the cut-off of Manfree, and this statement of Mr. Mitchel was made subsequent to that time. In view of the defense of Maytag West Coast (Mr. Mitchel's testimony that his company did not engage in a combination in restraint of trade (Tr. 3404-3405)), it was prejudicial to deny to appellants the probative value of Mr. Mitchel's statement to Mr. Freeman of Manfree concerning Maytag's reasons for cutting off appellant.

2. The Court erred in excluding Pl. Ex. for Id. Nos. 565, 1079, 1089, and 4165 (see Specification of Errors V, G, 1, 3 and 4.) Appellants sought to prove that Maytag did not want them to show prices in their newspaper advertisements of Maytag appliances (Pl. Ex. for Id. No. 565). This evidence was excluded. The Court further excluded evidence that in refusing to deal with Manfree, Maytag gave consideration to the fact that appellants were then operating as a so-called "closed-door" discount store. (Pl. Ex. for Id. No. 4165). The Court also excluded evidence (Pl. Ex. for Id. Nos. 1079 and 1089) that Maytag granted Hale special prices on Maytag appliances, which would have rebutted Maytag's defense to its admitted refusal to deal with Manfree, consisting in part of the drinking habits of a Manfree salesman. In view of this asserted "personal reason" for withdrawing a franchise, appellants should have been allowed to introduce these exhibits to show that in truth there were anti-competitive and illegal reasons for such refusal to deal by Maytag.



H. The Court Erroneously Excluded The
Deposition Testimony Of Mr. Arthur
Alpine, Deceased President Of U.S.E.
(Specification of Errors, V, H.)

The deposition of Mr. Alpine, President of U.S.E. and Vice President of Manfree, contained extensive testimony concerning his requests to vendor representatives for major appliances and television sets, and the substance of his conversations with these various representatives. This evidence was rejected, primarily on the ground that appellees' counsel did not have an opportunity to study the memoranda and notes made by Mr. Alpine of these conversations, during the deposition. Mr. Alpine died before the completion of the deposition (Tr. 6223). The deposition was taken on March 15, 1961, April 1, 1961, April 3, 1961, April 4, 1961, April 5, 1961, was recessed to May 1, 1961 and continued to May 4, 1961. Appellees did not move (motion by Lancaster) for production of the memoranda until November 21, 1962, in relation to interrogatories filed in January, 1962 (R. 242). Appellees delayed an unreasonable period of time in attempting to obtain these memoranda, even assuming that it was proper to order them produced. Their untimely actions should not prejudice appellants' utilization of the deposition of Mr. Alpine. It is respectfully urged that F.R.C.P. Rule 32, and the decisions construing this Rule, require the party opposing the introduction of the deposition to show that he has acted with reasonable promptness and diligence. Such is not the case here. A similar matter was placed before the District Court in Re-Track Corp. vs. J. W. Speaker Corp., 212 F.Supp. 164 (E.D. Wis. 1962), where plaintiffs sought to prevent the introduction of a deposition they took of the defendant's deceased president

on the grounds of incompleteness (the witness refused to answer some questions and lacked information to respond to others), because they intended to ask many other questions before subsequent death of the deponent made that impossible, and because the deposition was for discovery and not the perpetuation of testimony. The Court stated, in response (212 F.Supp. 164, 169):

"The testimony, as far as it goes, was in response to cross-examination. Plaintiff has not indicated with particularity the area and scope of the matter not completely investigated. The Court is of the opinion that under the rule favoring the admissibility of evidence in doubtful cases the testimony of Mr. Speaker on deposition is admissible. See Paul v. American Surety Co. of New York, 18 F.R.D. 68 (S.D. Tex. 1955). Incompleteness and the freer range of questions and answers for the purpose of discovery are factors bearing on the weight of the testimony and not on its admissibility." (Emphasis added)

That the position taken by the District Courts is the prevailing one is shown from additional authority: Kawetize vs. Ravich, 198 F.Supp. 841, 842 (E.D. Pa. 1961); Genyard vs. Jones, 18 F.R.D. 204, 205 (D.C. 1955); Paul vs. American Surety Co. of N.Y., 18 F.R.D. 68 (S.D. Tex. 1955); Inland Bonding Co. vs. Mainland National Bank, etc., 3 F.R.D. 438, 439 (D.N.J. 1944); Batelli vs. Kagan & Gaines Co., Inc., 236 F.2d 167, 169 (9th Cir. 1956); 4 Moore, Federal Practice (2nd Ed. 1966) para. 32.02 (p. 2203).

I. The Court Excluded Material Evidence Showing The Establishment Of A Conspiracy Of Retailers, Distributors And Manufacturers To Control Market Entry In The Retailing Of Major Appliances And Television Sets In San Francisco, And Showing The Scope Of This Conspiracy In The Boy-cotting Of Appellants:

(Specification of Errors, V, I.)

1. The Court rejected evidence of the meetings among the retail defendants whose purpose was to control retailer advertising in San Francisco, through the activities of the Home Furnishing Advisory Committee of the San Francisco B.B.B. (see Specification of Errors, V, I, 9.)

Pl. Ex. for Id. Nos. 453, 584, 390, 391, 396-A, 393-A, 400, 403 and 404 came from the files of Hale, Lachman Bros., and Redlick (see Specification of Errors, V, I, 9.) It is respectfully urged that this evidence is well within the ruling of Standard Oil Company of California vs. Moore, 251 F.2d 188, at 209:

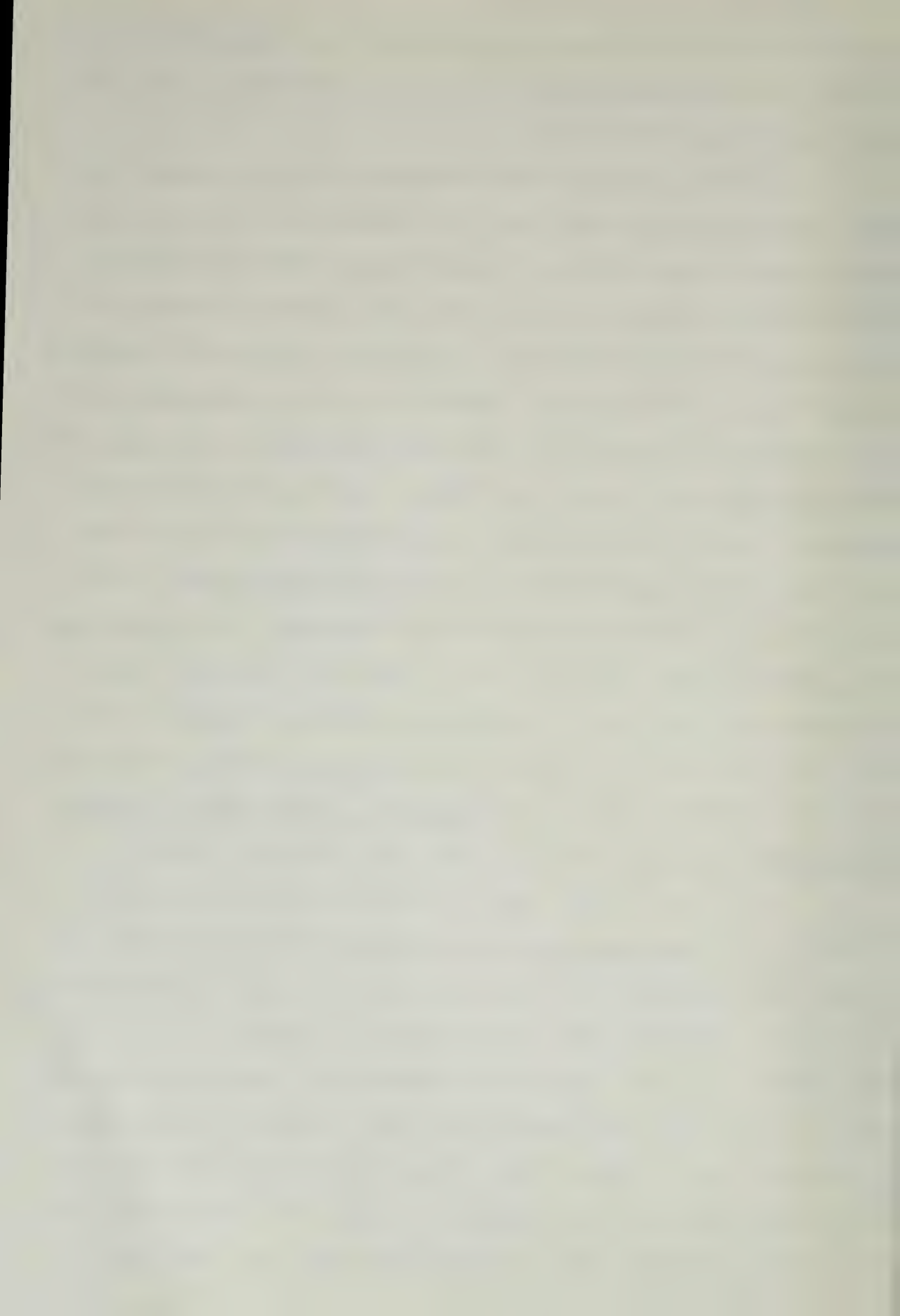
"There is a great deal of additional evidence, however, tending to show parallel action by appellants, or actual contacts or communications between them, concerning other supplies, storage, marketing and pricing practices. The significance of evidence of this kind lies in its tendency to picture a business setting in a relationship which invites inferences favorable to Moore's position."

Appellants' theory is that part of the illegal combination contemplated excluding U.S.E. as an advertiser in the daily newspapers in San Francisco County. This, of course, is necessary, if the retail list prices of the distributors and manufacturers are to be maintained, since the discount stores do not follow these list prices. The plan was successful as to the morning newspapers, and evidence concerning that aspect of the conspiracy was admitted as to all defendants (Tr. 2082, 2086, 2091, 2111-2113). The plan of exclusion was shown to be unsuccessful as to the San Francisco News Call-Bulletin, but a member of the retail group which adopted the uniform advertising code, Mr. R. E. Schreck of Sterling, was shown to have

contacted the Call-Bulletin concerning U.S.E. advertising shortly prior to the filing of the first complaint. (Tr. 1761-1768, 2327-2333, 5689-5700).

These exhibits were therefore further relevant to show attempts by appellees and co-conspirators to exclude appellants from the San Francisco retail market for such products, and to prevent appellants from obtaining effective newspaper advertising of such products. It was for the jury to determine, based upon all the evidence, whether or not the admitted meeting between Mr. Schreck, and Mr. Wally Brooks, Mr. Al Leary of the Call-Bulletin, and Mr. Bob Weiss, Sterling's advertising director, at the Olympic Club in San Francisco in June, 1960 (Tr. 5692-5700) was pursuant to a plan and arrangement to exclude U.S.E.'s advertising from that newspaper. See Esco Corp. vs. United States, 340 F.2d 1000, 1005-1007 (9th Cir. 1965). The apparent inability of witnesses Schreck and Leary to remember what precisely occurred at that meeting permits inferences in favor of appellants. See Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196, 203 (9th Cir. 1963).

2. The Court erred in excluding statements of Mr. Wilcox of the San Francisco Call-Bulletin to Mr. Mittelman of U.S.E. that attempts had been made to keep U.S.E.'s advertising out of his newspaper (see Specification of Errors, V, I, 10.) Throughout the trial appellees attempted to create the impression for the jury, that appellants had attempted to manufacture a lawsuit, out of whole cloth. They attempted to detract from the significance of their refusals to deal with Manfree in 1960, by claiming that the 1960 letters from appellant were sent to



them at the instigation of appellants' attorney, and therefore were not sent in good faith. (Cf. Standard Oil Co. of California vs. Moore, supra, at page 201). The statements made by Mr. Wilcox, an officer of the Call-Bulletin, about U.S.E. advertising, therefore were relevant and material on the issue of appellants' good faith in bringing this action, and were specifically offered on this ground (Tr. 2131-2132). Where the good faith of a party, or the reasonableness of its conduct is put in issue, hearsay statements upon which it acted may be shown. Central Heights Imp. Co. vs. Memorial Park, 40 C.A. 2d 591, 609 (1940); Gilbert vs. Gilbert, 98 C.A. 2d 444, 446 (1950).

J. The Court Erred In Excluding Evidence That Appellees Entered Into Special And Favored Arrangements With Hale And Other Retail Defendants:

(Specifications of Errors, V: A, 3; B, 8; C, 6; D, 5; E, 3; F, 1; G, 4.)

The evidence (summarized in the specifications noted) establishing special arrangements between appellees and the retail defendants proved these parties had a common purpose and plan to control the market. Each discriminatory arrangement proved the willingness by the parties to support unlawful undertakings, whereby special advertising funds and special prices are afforded only to those who support the basic program of maintaining the San Francisco market as a list price, high margin area. United States vs. Paramount Pictures, Inc., 334 U.S. 131 (1940); American Tobacco Co. vs. United States, 328 U.S. 781 (1946).

THE COURT ERRED IN EXCLUDING EVIDENCE
OF APPELLANTS' WRITTEN REQUESTS TO
VENDORS FOR PRODUCTS, AND OF STATEMENTS
BY THE VENDORS' REPRESENTATIVES TO
OFFICERS OF APPELLANTS CONCERNING THESE
REQUESTS

(Specification of Errors, V, I, 2 and 7.)

1. The basis of the Court's rejection of conversations between appellants' managing agents and representatives of appellees or co-conspirators was an asserted lack of foundation as to the authority of these representatives to bind his corporate principal. In so doing, it adopted a very narrow rule, for these representatives were clearly shown:

(i) to have authority to take orders for products involved; (ii) to be responsible for submitting requests for franchises to management; (iii) to be responsible for the pricing and delivery of goods; (iv) to have participated in top-level sales and management conferences; and (v) to have exercised supervisory control over sales in their jurisdiction. All of the persons to whom appellants addressed their requests were certainly in a position to and ordinarily would carry these requests to others in the normal course of their business affairs. Sales representatives of the vendors involved were shown to have been given wide discretion in the exercise of their affairs. They clearly were the ears and antennae of the corporate defendants and their statements should be admissible against such parties. See Newark Insurance Co. vs. Sartain, 20 F.R.D. 583 (N.D.Cal. 1957) at 584-586, and the review of authorities contained therein, as well as the authorities cited in appellants' Memorandum Concerning Admissibility

In Evidence of Conversations Between Bernard Freeman And Certain Representatives, etc. (R. 1751).

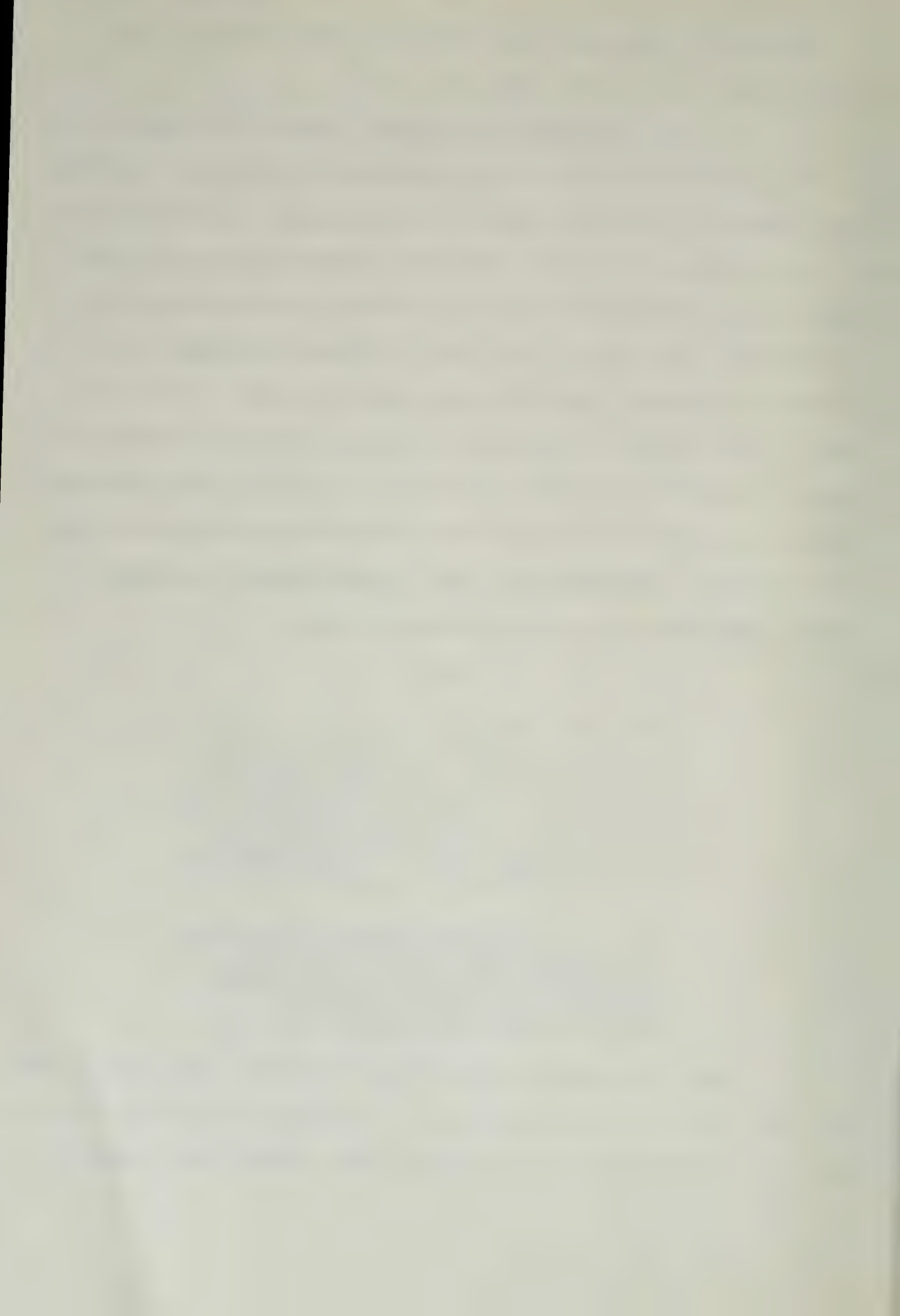
2. In rejecting appellants' request letters written in 1960, 1961 and 1963 to co-conspirators Lancaster, Motorola, Westinghouse, Sylvania, Basford, and Graybar, and to Cezan Co. in Los Angeles, it refused relevant evidence demonstrating appellants' complete inability to obtain leading brands of merchandise, including lines sold by these companies. Failure to receive product, despite bona fide requests, is a vital part of the mosaic of evidence proving a concerted refusal to deal. A group refusal to deal was the gravamen of appellants' action, and they should have been permitted to establish all such refusals. Standard Oil Co. of California vs. Moore, supra; Esco Corp. vs. United States, supra.

XIII

THE COURT ERRED IN EXCLUDING, OR NOT APPLYING, FURTHER SUBSTANTIAL AND MATERIAL EVIDENCE SHOWING THE ESTABLISHMENT OF A CONSPIRACY BETWEEN THE APPELLEE AND CO-CONSPIRATOR RETAILERS, DISTRIBUTORS, AND MANUFACTURERS, TO CONTROL MARKET ENTRY IN SAN FRANCISCO
(Specification of Errors V, I.)

- A. The Court Excluded Evidence That Meyer Investigated The Source Of R.C.A. Televisions Being Sold By Discount Stores In Northern California:
(Specification of Errors V, I, 3.)

The jury could clearly infer from Pl. Ex. for Id. Nos. 787, 788, 789 and 790, that R.C.A.'s Northern California distributor was actively seeking to control and prevent purchases of R.C.



televisions by discount stores. Such is obviously relevant evidence showing a plan to prevent discount stores in San Francisco from obtaining television sets. The signators to the letters contained in these exhibits were assisting retailer Hale, by finding the sources of R.C.A. televisions appearing in the inventories of competing retailers who "cut prices"; consequently, this evidence was an important part of the proof of the establishment of a conspiracy to prevent discount stores from being able to obtain such products. See Esco Corp. vs. United States, 340 F.2d 1000 (9th Cir. 1965).

B. The Court Excluded Evidence That Westinghouse Believed That It Could Not Sell Both The Large Department Stores And The Discount Stores In San Francisco County, And That Macy's Requested There Be No Price Competition On Westinghouse Appliances:

(Specification of Errors V, I, 4)

The Court ruled that Pl. Ex. for Id. Nos 352, 479-481, and the expected testimony of Mr. Hangauer of Westinghouse concerning them, to be irrelevant, as they appeared to be based upon hearsay reports or rumors. (Tr. 6148, 6158). But all companies' sales and distribution policies are based upon information obtained from various sources in the market, and the information reflected here was particularly material and relevant to appellants' case, in showing that Westinghouse believed that it could not sell to the discount stores and the large department stores at the same time, because of strong adverse reaction from the latter. Intraoffice reports of co-conspirators are extremely relevant and material, and are admissible as evidence. Schine Chain Theatres, Inc. vs. United States, 334 U.S. 110, 116-117 (1948).

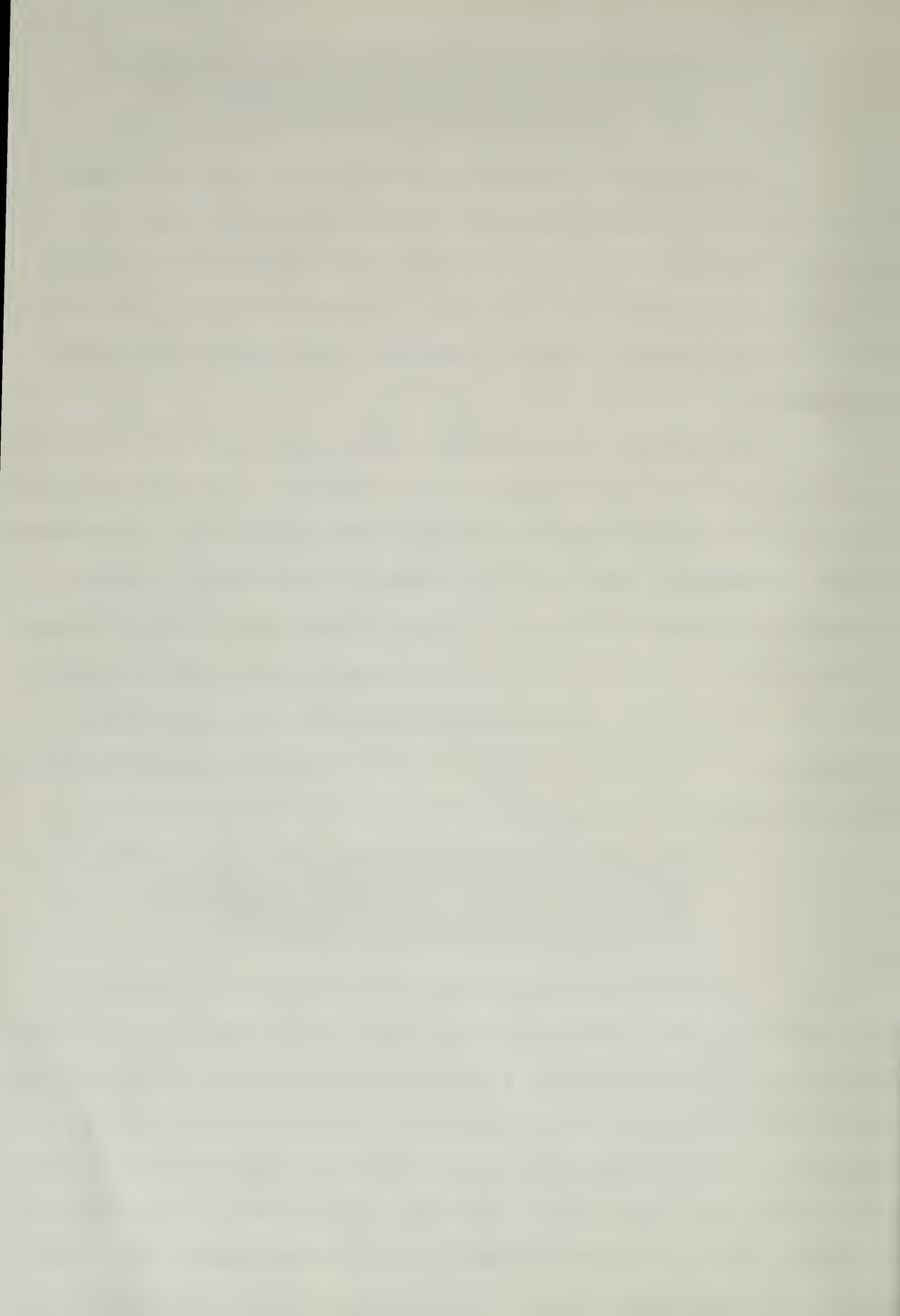
C. The Court Excluded Evidence That The Boycott Prevented Manfree From Obtaining Products From Outside The San Francisco Area:
(Specification of Errors V,1,5; V,D,4)

The evidence offered showed that not only were appellants unable to obtain Norge and R.C.A. appliances from Los Angeles, but also that they attempted unsuccessfully to obtain Hotpoint appliances from that area. As shown before, these refusals to sell were allegedly based on territorial distribution agreements.

Evidence of such refusals based upon such arrangements were clearly relevant to appellants' proof of a boycott conspiracy, one purpose of which was to maintain such territorial arrangements. These agreements, when part of a boycott conspiracy, clearly constitute unlawful activity. United States vs. Arnold, Schwinn & Co., 87 S.Ct. 1856 (1967); White Motor Co. vs. United States, 272 U.S. 253 (1963); Walker Distributing Co. vs. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); Girardi vs. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963).

D. The Court Excluded Evidence That The Vendor Appellees And Co-conspirators Engaged In Substantial Trade With Other Departments Of U.S.E., While Boycotting Manfree:
(Specification of Errors V, I, 8.)

It was uniquely relevant and material for appellants to show that the refusals to deal with Manfree were based solely upon its classification as a price-cutter on major consumer items rather than because of any business infirmity or lack of customer exposure. Thus, appellants should have been permitted to prove, as offered (Tr. 5857-5859, 5863-5866, 6559-6601), that the same vendors rigidly denying Manfree product, were engaged in a very strong and profitable trade in the retailing of small appliances



and radios with other concessionaires of U.S.E., situated on the same premises. It is a matter of logic that the ability to so freely obtain small appliances demonstrates that the refusals to deal had other basis than the manner in which U.S.E. and its departments (Manfree included) conducted business. See Standard Oil Co. of California vs. Moore, 251 F.2d 188, 209-212 (9th Cir. 1957).

E. The Court Excluded Relevant Evidence Showing The Factory Appellees Met In National Trade Associations And Entered Into Agreements In Restraint Of Trade:

(Specification of Errors, V, I, 11, 12, 13, 14 and 15.)

Appellants offered documentary evidence (summarized in the specifications noted) which showed that the factory appellees, during the period of time involved, (a) as members of N.E.M.A. agreed to a common, uniform definition of "discount stores"; agreed not to divulge retail market statistical information gathered by N.E.M.A. to "outsiders"; (b) as members of N.E.M.A. and/or A.H.L.M.A. agreed to exchange information as to retail sales of their respective consumer products on a nation-wide basis, by price classification; (c) agreed that marketing matters common to manufacturers of major electrical appliances, home laundry equipment, and television sets would be handled in trade association meetings attended by representatives of the trade associations (e.g., N.E.M.A., A.H.L.M.A., and E.I.A.) to which such manufacturers belong; (d) as members of A.H.L.M.A. agreed not to seek Federal Trade Commission review or approval of A.H.L.M.A.'s so-called "advertising code".

This evidence is all material to show that appellants

faced a fixed and rigid distribution system with national origins, making the boycott one of common purpose and thus easy to enforce and administer. The evidence showed that Borg-Warner, G.E., Frigida Hotpoint, and Whirlpool, together with others, discussed the common definition to be applied to "discount stores". In discussing this matter, the G.E. representatives pointed out that a common feature of the discount store was its "low price" or "cut price" policy. (Pl. Ex. for Id. Nos. 2093-2094).

That the associations were not simply statistical trade groups, is shown by the evidence that the members of N.E.M.A. and A.H.L.M.A. refused to make their trade information available to non-members; exchanged price classification information; promulgated their own advertising codes which they sought to enforce on retailers; met to discuss price information; and sought to establish a fixed nationwide distribution system operating at fixed prices (Pl. Ex. for Id. No. 431, Appendix B). All this evidence was admissible evidence, as stated in American Tobacco Company vs. United States, 147 F.2d 93 (6th Cir. 1944), at 119:

"The only purpose for which the Court admitted the evidence was to show that the appellants had an opportunity of 'gathering together and communicating between each other a plan or plans alleged to constitute the conspiracy.' This evidence, as well as that indicating that appellants controlled the organization, was properly admissible for the purpose of showing that the Association served as a means of communication and gave the appellants an opportunity to conspire and act in combination. See Minner vs. United States, 10 Cir., 57 F.2d 506; Kanner vs. United States 7 Cir., 34 F.2d 863." (emphasis added)

XIV

THE COURT ERRED IN EXCLUDING FINANCIAL STUDIES SHOWING THAT HALE AND THE OTHER RETAILER CO-CONSPIRATORS MAINTAINED MANUFACTURERS' AND DISTRIBUTORS' LIST PRICES AS THEIR TAG PRICES

(Specification of Errors, V, I, 16)

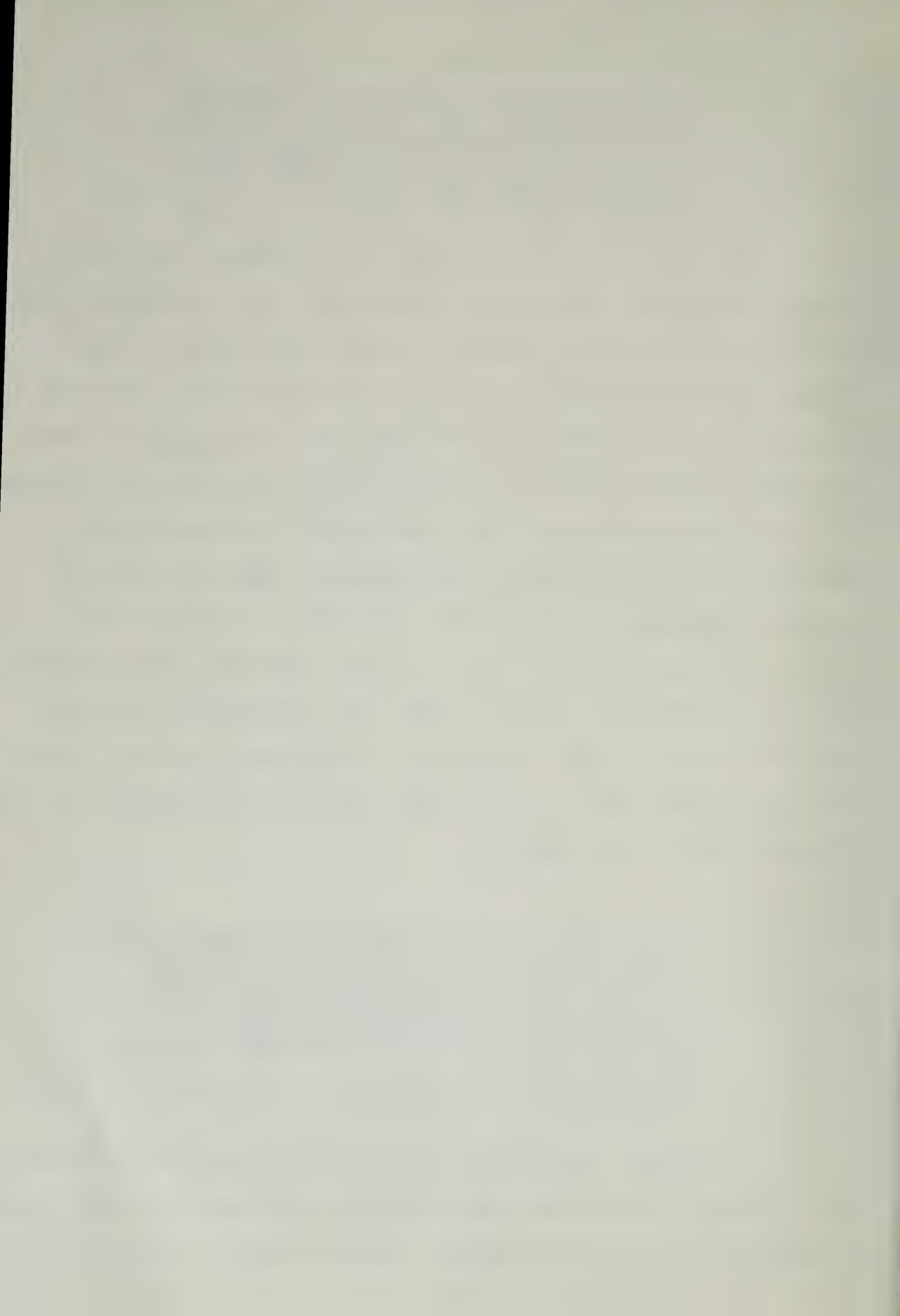
Pl. Ex. for Id. Nos. 1561-1578; 1579-1681 and 1560, studies prepared by appellants' accountant, were excluded on the ground that such pricing studies did not specifically relate only to the San Francisco stores of these retailers. But even assuming so, clearly the relevant issue was the policy of these companies of maintaining their tag prices at prices which followed the list prices promulgated by appellee and co-conspirator . vendors, regardless of where (San Francisco and other areas) the stores implemented this plan. Therefore, studies, the bulk of which pertained to San Francisco (although not entirely based on San Francisco store sales), was relevant and material show such policy of such retailers. It is urged that the objections urged below went to the weight and not to the admissibility of these retail price studies.

XV

THE COURT EXCLUDED APPELLANTS' TABULATIONS WHICH SHOWED THAT THE RETAILERS FOLLOWED FACTORY LIST PRICES, THE AMOUNT OF TRADE AND PREFERENTIAL DEALINGS BETWEEN THE CO-CONSPIRATORS, THEIR POWER TO ENFORCE A BOYCOTT AND PROOF OF ITS EXISTENCE BY ITS ECONOMIC EFFECT

(Specification of Errors V, I, 17, 18, 19 and 20)

1. These tabulations, prepared by appellant's accountant, Mr. Honig, were based upon documents produced from the files of appellees and co-conspirators. They showed the relative market

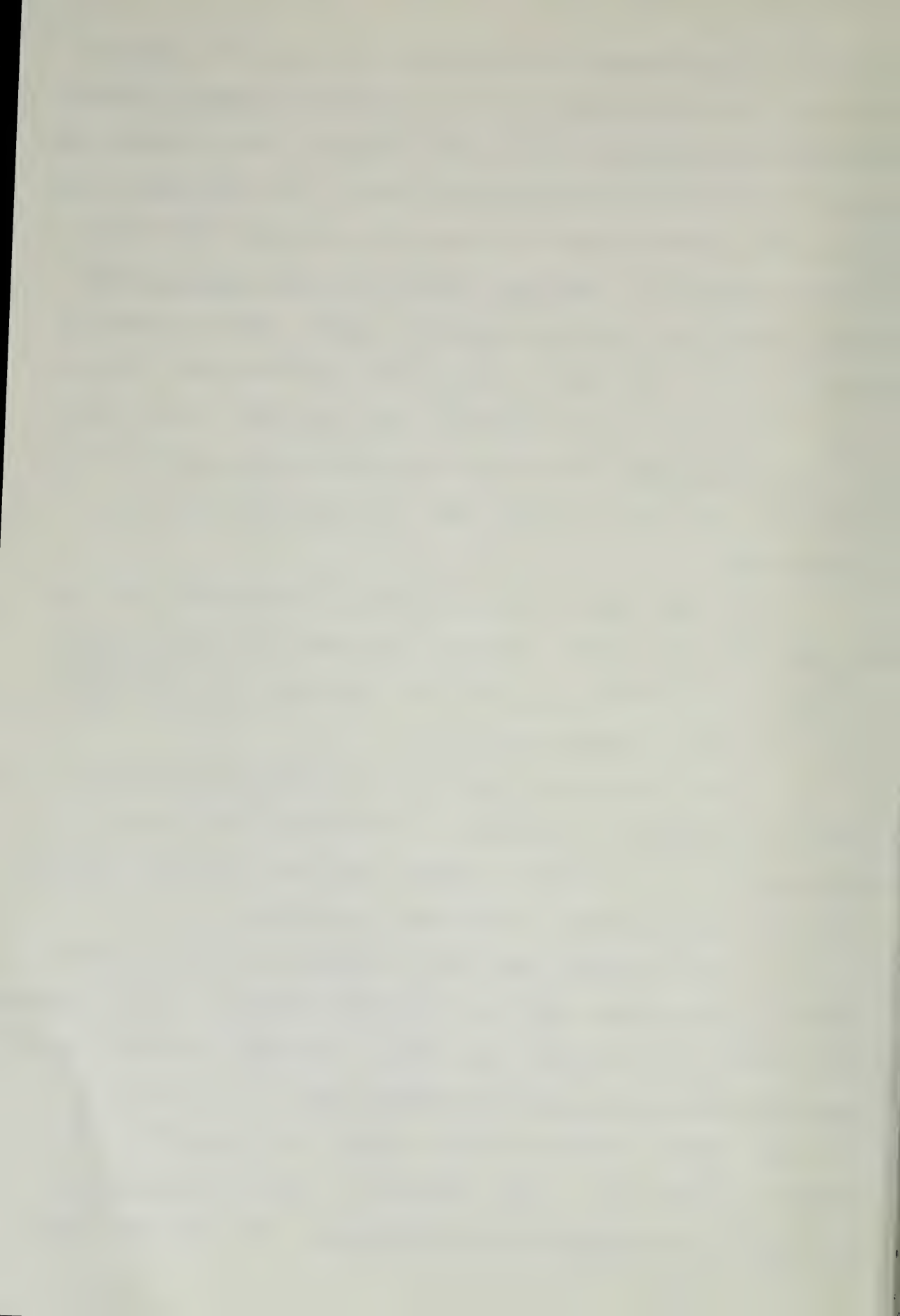


power of the co-conspirator retailers, the size and strength of their purchasing power, and the volume of product transfers between such retailers, among other things. This evidence was relevant to show economically how leverage could be exerted by these retailers to create and maintain a boycott, and should have been admitted. American Tobacco Co. vs. United States, supra; Lessig vs. Tidewater Oil Co., supra. This evidence is contained in Pl. Ex. for Id. Nos. 4334, 4336 and 4340 (dollar volume of purchases from vendors); and Nos. 4335, 4337, 4339, 1491 and 1492 (study of co-operative advertising credits from vendors to retailers, showing many instances of fully-paid advertising).

2. The Court also erroneously excluded Pl. Ex. for Id. Nos. 1500 and 1500-1, showing the marked decline in sales and profits of Manfree in 1957-1964, following the institution of the complete boycott against it.

This particular study clearly showed the boycott's effect upon Manfree's business in relation to the brands of appellee and co-conspirator vendors, and was therefore further proof of their violation of the antitrust laws.

This evidence was highly probative of the complete success of the scheme and plan to boycott Manfree, and to exclude this evidence on the liability issue constitutes manifest error. Haverhill Gazette Co. vs. Union Leader Corp., 333 F.2d 798, (1st Cir. 1964). Evidence of the impact of a conspiracy is relevant to the proof of the conspiracy itself. Continental Ore Co. vs. Union Carbide and Carbon Corp., 370 U.S. 690 (1962).



As the First Circuit stated in Haverhill Gazette Co., at 802:
"In a private antitrust action, liability and damages are not
separate."

XVI

THE COURT ERRED IN EXCLUDING EVIDENCE
THAT ANOTHER SAN FRANCISCO RETAIL STORE
(KLOR'S) WAS SUBJECTED TO A BOYCOTT IN-
VOLVING G.E., R.C.A., PHILCO, ZENITH
AND WHIRLPOOL PRODUCTS, AMONG OTHERS
(Specification of Errors V, I, 21 and 22)

Appellants offered as a witness Mr. Sam Fractenberg,
an officer of Klor's, Inc., a former retail store in direct
competition with Hale. Mr. Fractenberg was also formerly a
salesman for Admiral products, during this period he was asked
by Hale representatives to identify for them to whom in San
Francisco Admiral was selling its products. As a former repre-
sentative of Klor's, Mr. Fractenberg was to testify concerning
Klor's inability to obtain R.C.A. television, Philco appliances,
and other major appliances and television lines, because of
pressure on the vendors from Hale, its next-door competitor.

The record shows that the Court allowed appellants
to call Mr. George Klor, former president of Klor's (Tr. 1359),
but appellants advised the Court that he was ill (Tr. 5680),
and that Mr. Fractenberg was able to testify to the many matters
upon which Mr. Klor would have testified. However, the Court
refused to permit appellants to call Mr. Fractenberg, because
he had not been listed as a potential witness (Tr. 5682-5683).

Under the Moore case, proof of the similar boycotting
of another dealer in the market is relevant evidence of the pre-
sence of a conspiratorial group, controlling market entry. This

evidence of that nature should have been admitted.

XVII

IT WAS ERROR TO REFUSE TO APPLY THE ORAL
DECLARATIONS OF REPRESENTATIVES OF ONE
CONSPIRATOR AGAINST ALL; AND TO REFUSE
TO ALLOW SUCH DECLARATIONS PROBATIVE VALUE
(Specification of Errors, VI.)

A. In Applying The Evidence, No Distinction
Should Be Made Between Oral Declarations
And Writings:

The Court made a distinction between the admissibility of documentary evidence offered as to one conspirator, and oral declarations so offered, as to applying such evidence against all the defendants in the case. It is urged that there is no such distinction in the law of conspiracy. The prima facie establishment of a conspiracy allows all declarations of one co-conspirator admissible against all whether such declarations are written or oral. Standard Oil Co. of California vs. Moore, 251 F.2d at 218-219 (9th Cir. 1957).

B. The Statements Of Sales Representatives
Within The Scope Of Their Authority Were
Admissions Against Their Principal:
(Specification of Errors VI, A.)

Mr. Gentile was "field sales representative" for the entire State of California for R.C.A. at the time of his deposition (Tr. 4645-4648, 4748-4750, 4753-4754). Thus it was error to rule that his admissions would not bind R.C.A. (See Tr. 4753). Similarly, witness Wade Brightbill had the same position with R.C.A. at the time of his testimony (Tr. 4754, 4760-4761, 4799-4802), and his admissions were applicable against that appellee (See Tr. 4801).

Such witnesses, at the time of making the statements which appellants sought to have applied against their principals, were employed by such parties as managing agents. Thus, these declarations should have been admitted into evidence against such principals. See Gibbs vs. RCA Victor Distributing Corporation, 214 F.Supp. 52, 53 (W.D. Mo. 1963); Newark Insurance Company vs. Sartain, 20 F.R.D. 583 (N.D. Cal. 1957).

C. The Court Erred In Ruling That Managing Agents Of Defendants, Who Had Left The Employ Of That Party By Time Of Trial, Were Not Representatives Of Adverse Parties Under F.R.C.P. Rule 43(b):
(Specification of Errors VI, B.)

It is respectfully submitted that Rule 43(b) allows a party to call a former managing agent of an opposing party, as an adverse witness. First, this would seem implicit in the Federal Rules by reference to Rule 26(d)(2) cited above. Secondly, Rule 43(a) governs the competency of witnesses, and holds that the most liberal rule of admissibility should govern in questions of this nature. Clearly the rule in California is that former employees or officers may be called as an adverse witness under the similar provisions of C.C.P. 2055 (now Cal. Ev. Code §776). Wells vs. Lloyd, 35 C.A.2d 6 (1939); Scott vs. Del Monte Properties, 140 C.A.2d 756 (1956). Thus it was error for the Court to hold that the testimony of witness Mr. Sanford would not bind Hale (Tr. 504-507, 518-521 at Tr. 518), or similar holdings as categorized in VI B, 1 of the Specification of Errors.

D. The Court Erred In Not Allowing Appellants To Examine Witnesses Who Were Managing Agents Of Adverse Parties As Adverse And Hostile Witnesses:

(Specification of Errors VI, C.)

Representatives of dismissed defendants, alleged to have participated in a conspiracy, are thus hostile and adverse witnesses to the appellants, who called them in the six instances summarized in the Specification of Errors VI, C. See United States vs. Uarte, 175 F.2d 110 (9th Cir. 1949).

XVIII

APPELLANTS SHOULD HAVE BEEN, BUT WERE NOT, PERMITTED FULL SCOPE OF CROSS-EXAMINATION, REHABILITATION, AND REBUTTAL ON ISSUES RAISED BY APPELLEES IN THEIR EXAMINATIONS OF WITNESSES.

(Specification of Errors VII)

The witnesses listed in the Specification of Errors (with the exception of Mr. Freeman, an officer of appellants), were hostile and adverse witnesses, since they were at the times of the acts complained of, agents and employees of the various appellees and co-conspirators. Under F.R.C.P. Rule 43(b), as noted above, appellants should have had the benefit of the full scope of leading and impeaching questions, which they were denied in the instances noted.

As to Mr. Freeman, appellee G.E., on its cross-examination, introduced G.E. Ex. No. 8350(A-E) relating to certain allegedly dishonest merchandising practices of Manfree, and cross-examined Mr. Freeman on that subject (Tr. 6030-6036). However, on re-direct examination, the Court prevented appellants from rehabilitating the witness on that point, and from introducing evidence that such practices were common among other

retail merchants (see Pl. Ex. for Id. No. 5111; Tr. 6055-6057).

XIX

PREJUDICIAL ERRORS WERE COMMITTED IN
PRE-TRIAL ORDERS OF THE COURT, RELAT-
ING TO THE DISCOVERY OF EVIDENCE
(Specification of Errors VIII)

A. Appellants Should Have Been Permitted
Discovery Of All Intra-Company Memoranda
Or Other Writings In The Possession Of
Vendor Appellees Which Concerned Appel-
lants, And/Or The Retail Defendants:

Appellants served a subpoena duces tecum upon managing agents of appellees Frigidaire (Mr. John Shaw, on January 18, 1963), and R.C.A. (Mr. Gentile, on March 14, 1963) in connection with their depositions, which, by a common appendix, required such agents to produce the documents described above as their companies might hold in its files. (As to Frigidaire, see R. 302-307; as to R.C.A., see R. 327a-332). When such documents were not so produced, appellants filed Motion(s) for An Order To Show Cause Why Documents Should Not Be Produced by these parties. (As to Frigidaire, see R. 298-322; as to R.C.A., see R. 323-352). After hearing (Pre-Trial Hearing of April 17, 1964, P.Tr. 2-17, 21-23, 25-84), the Court denied appellants' motions, and entered orders which qualified the documents they were to produce of the nature described above (Order as to R.C.A., R. 413, 414 (see (e) and (j)); Order as to Frigidaire, R. 419, 420 (see (5)).)

Similarly, in its Motions(s) For Production of Documents addressed to the defendant factories (R. 422, 425), and defendant distributors (R. 434, 437) in June, 1964, appellants sought production of:

"15. All intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above named or the retail de-

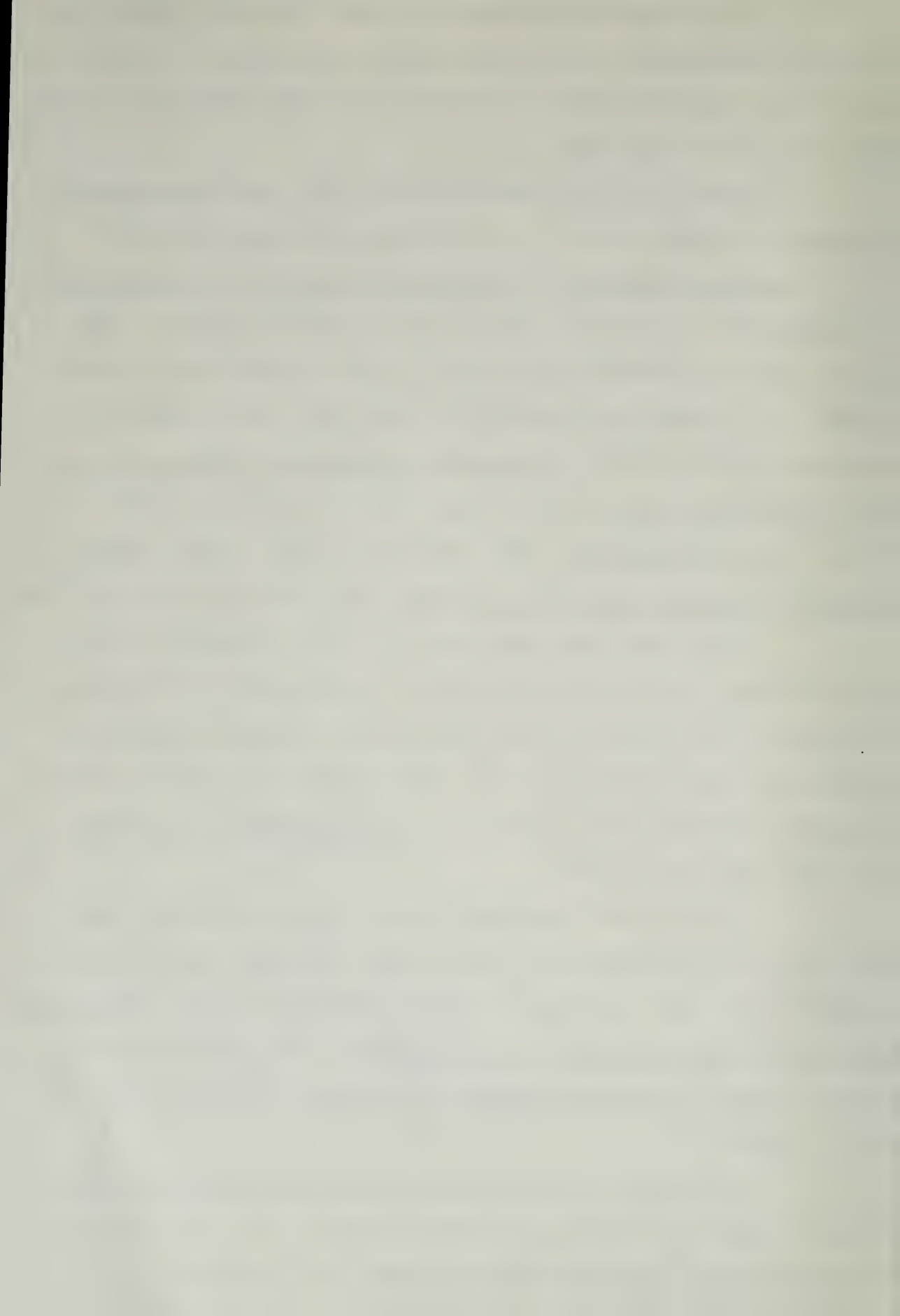
After hearing on these motions, the Court denied the portion quoted above (Pre-Trial Hearing of August 7, 1964; P. Tr. 88-90) and entered orders accordingly (R. 598, 607-608, 615-616, 680, 673, 786, 618, 789).

Under F.R.C.P. Rules 45 and 26(b), such documentary evidence is discoverable if it contains information which ". . . appears reasonably calculated to lead to the discovery of admissible evidence." (Rule 26(b); emphasis added.) The party seeking documentary evidence of this nature may proceed either by a motion for production (Rule 34), or (as here) by subpoena (Rule 45(d)). Alexander's Department Stores, Inc. vs. E. J. Korvette, Inc., 198 F. Supp. 28, 29 (S.D.N.Y. 1961); 4 Moore, Federal Practice, para. 26.10, p. 1053 (2d Ed. 1966); Olympic Refining Company vs. Carter, 332 F.2d 260 (9th Cir. 1964)

That there was good cause for full discovery of all intra-company documents pertaining to appellants, or the retail defendants, was clearly and unequivocally shown by appellants' pleadings, the trial record, and the hedging and dodging of the witnesses demonstrated therein. Cf., Schlagenhauf vs. Holder, 379 U.S. 104, 119 (1964).

The subpoena addressed to Mr. Gentile and Mr. Shaw should have been enforced, since these employees were managing agents within the meaning of F.R.C.P. Rule 26 and 43. Gibbs vs. RCA Victor Distributing Corporation, 214 F. Supp. 52 (W. D. Mo., 1963); Newark Insurance Company vs. Sartain, 20 F.R.D. 583 (N.D. Cal., 1957).

Appellants were prejudiced because definitive orders were not granted allowing the production of all intra-office correspondence regarding their requests for product.



B. Appellees And Co-Conspirators Should Have Been Required To Admit The Existence Of Any Statements Or Reports Reflecting Conversations Between Their Representatives And Anyone Else, Concerning Appellants' Purchase, Sale Or Advertising Of The Products, Or By The Retail Defendants And Co-Conspirators:

In its written Interrogatories to All Defendants, filed September 29, 1964 (R. 625), appellants asked:

"INTERROGATORY NO. 2: State whether or not there exists . . . written statements or reports reflecting any conversations between an employee, officer, agent, or representative of your company . . . and any other person having to do, in whole or in part, with the acquisition, sale or advertising of television sets or major household appliances by the plaintiffs . . . or the retail defendants" (Emphasis added)

Interrogatories Nos. 3, 4, 5 and 6 asked for the dates, locations and custodians of such documents, and whether or not they were claimed to be privileged (R. 626).

After hearing, the Court ruled that these interrogatories did not have to be answered (Pre-Trial Hearing of October 16, 1964, at P. Tr. 6-10) after defendants objected to them, and entered its order accordingly (R. 671).

Pursuant to F.R.C.P. 33, interrogatories to adverse parties may ". . . relate to any matters which can be inquired into under Rule 26(b)"

Appellants were entitled to have identified and to inspect the same type of memoranda they earlier had to produce for defendants under the Order of Judge Weigel which was clear and broad (R. 270) (produce ". . . all notes, documents, papers . . . made by plaintiffs or officers, employees, agents or persons

acting on behalf of plaintiffs, of any conversation wherein one party to the same was an employee of any one of the defendants or alleged co-conspirators . . .")

It is respectfully urged that appellants are entitled to lay a foundation as to the existence of witness statements and reports. D.I. Chadbourne vs. Superior Court, 60 C.2d 723 (1964); United States vs. Aluminum Co. of America, 1961 Trade Cases, para. 69,910.

C. The Factory Defendants Should Have Been Required To Produce Litigation Statements, All Correspondence Received From Distributor Defendants, And From Appellants (Relating To The Matters In Issue) And Correspondence Which Reflected Discussions At Trade Associations Meetings About Discount Stores:

Appellants moved for the production of any documents held by the factory defendants, of the general nature summarized above, by its motion filed November 20, 1964. (R. 745; see Item 20 (R. 749), Items 22(c), (d) and (e) (R. 750), and Item 27(f) (R. 751-752).)

After hearings, the Court denied production of the documents called for under the parts of the motion specified above. (See Pre-Trial Hearing of December 30, 1964, P.Tr. 109-113; 115-119; 124-127; 174-182; Pre-Trial Hearing of December 31, 1964, P.Tr. 234-237; 247-248; 256; R.129, 978, 982-983, 1008, 1019, 1057, 1063).

Correspondence between the factories and their distributors as precisely limited and defined in the motion could only reasonably lead to the discovery of relevant evidence since the description of them was relevant by definition.

Correspondence produced under Item 27(f) could either indicate (or lead to the discovery of such) evidence that the factory representatives discussed discount stores during trade association meetings, so indicating their awareness of this new merchandising phenomenon, and more importantly, their concern about its price-cutting and price de-stabilizing impact. Such evidence would provide the motivational cement to show that the circumstantial evidence of common refusal to deals was part of an overall design to assist key retailers in boycotting the new discount store operations.

For the reasons stated above, appellees G.E., R.C.A., Maytag and Whirlpool should have been required to answer Interrogatories Nos. 1, 2, 3, and 6 of Plaintiffs' Second Interrogatories Directed To All Defendants, filed December 7, 1964 (R. 790, 791-792). After hearing, the Court sustained appellees' objection to identifying statements or reports. (Pre-Trial Hearing of December 30, 1964; P.Tr. 197-200; 203-205; R. 972, 969-970, 986, 1021, 121). Such interrogatory sought production of any litigation statements or reports reflecting discussions about appellants, whether the result of attorney interviews or not, for the period of January 1, 1957 to and including August 4, 1964 (when the second complaint was filed); thus comprising a final, unsuccessful attempt to obtain such witness statements.

Clearly, appellants were prejudiced in having to face hostile and adverse witnesses who may have made statements concerning conversations with appellants or about appellants, as they were unable to discover the existence of such statements,

or whether they were or were not protected by the rule in Hickman vs. Taylor, 329 U.S. 385 (1947).

XX

CERTAIN ITEMS OF COSTS WERE IMPROPERLY
TAXED AGAINST APPELLANTS
(Specification of Errors IX)

The Court improperly taxed certain items of costs claimed by the appellees (see, generally, Tr. 6919-7029):

1. Cost of two copies of daily trial transcript:

Appellees ordered five copies of the transcript to be shared between the ten defendants (R. 2039). The Court taxes the costs of two sets. (See Hearing on Costs, November 30, 1965, Tr. 6920-6921).

2. The Court taxed the costs for one copy of every deposition taken by appellants, and by appellees. (See, for instance, Tr. 6931, 6942-6945, 6959, 6988, 7006, 7027).

3. The Court taxed the costs for copies of the transcripts of various pre-trial hearings. (See Tr. 6920, passim).

4. The Court taxed costs for reproduction of one copy of all appellants' exhibits, which were lodged in the courtroom before and during trial. (See, for instance, Tr. 6924, 7008).

5. The Court taxed as costs the travel expenses of Mr. Saxon, an officer of R.C.A., incurred by his trip from Las Vegas, Nevada to San Francisco for his deposition (Tr. 6979-6985).

Total costs taxed amounted to \$22,088.69 (R. 1979).

The basic policy for District Court discretionary power in taxing costs, was clearly expounded by the Supreme Court in Farmer vs. Arabian American Oil Co., 379 U.S. 227 (1964), where it said, concerning F.R.C.P. Rule 54(d), at p. 235:

" . . . We do not read that Rule as giving District Judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claim to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation. " (Emphasis added.)

The decision in Farmer re-established the ruling of the trial court disallowing costs of daily transcripts as "convenience of counsel" was not sufficient. 31 F.R.D. 191, 196 (S.D.N.Y. 1962). The appellees cited Independent Iron Works, Inc. vs United States Steel Corp., 322 F.2d 656, 676-679 (9th Cir. 1963) in support of taxing such costs (Tr. 6935-6940). Independent Iron Works, Inc., relies extensively on Judge Hinck's opinion in Perlman vs. Feldman, 116 F. Supp. 102 (D.C. Conn. 1953), where the court taxed costs for only one copy for all defendants, and that on a showing that the transcript was often used during trial in "conducting their examinations" of witnesses. (116 F.Supp. 102, at 106). Here, there was no such utilization, nor was there a demonstrable need by appellees for more than one copy; certainly not for two. In the face of the policy expressed in Farmer, charging losing litigant with the costs of conveniences the prevailing parties have "seen fit to incur", is not proper. See Kenyon vs. Automatic

Investment Co., 10 F.R.D. 248 (W.D. Mich. 1950); Braun vs. Hassenstein Steel Co., 23 F.R.D. 163, 165-168 (D.S.D. 1959); and Consolidated Fisheries vs. Fairbanks, Morse & Co., 106 F. Supp. 714 (E.D. Pa. 1952).

Costs of copies of depositions taken by plaintiffs are ordinarily not taxable in favor of prevailing defendants. Jerome vs. Twentieth Century Fox Film Corp., 71 F. Supp. 916 (S.D.N.Y. 1946). Even in the exercise of its discretion, the court should only tax as costs the copies of such depositions shown to have been put to use at trial, as distinguished from convenience in preparing for trial. Hancock vs. Albee, 11 F.R.D. 139 (D. Conn. 1951), followed in Independent Iron Works, Inc., supra; see Gillam vs. A. Shyman, Inc., 31 F.R.D. 271, 274 (D. Alaska 1962); Curaco Trading Co. vs. Federal Ins. Co., 3 F.R.D. 261 (S.D.N.Y. 1942), affv'ed 137 F.2d 911 (2nd Cir. 1943). However, even if the court further seeks to tax costs of copies of such depositions, it should not extend its ruling to those of representatives of co-conspirators, who were not parties to the trial. See Perlman vs. Feldman, supra, at 110. Thus, only the depositions listed on page 5 of appellants' Objections To Defendants Bills of Costs (R. 2042, 2046) should be subject to taxable costs. Copies of all depositions taken by appellants were not "necessarily obtained" for use at trial (see 28 U.S.C. §1920(2)); therefore under the policy expressed in Farmer, it was improper for the Court to tax costs upon all such copies ordered by appellees, as it did.

In the face of the general rule that copies of depositions taken by the prevailing parties, and not used at trial,



are not taxable (Burnham Chemical Co. vs. Borax Consolidated, Ltd., 7 F.R.D. 341 (S.D. Cal 1947)), the court nonetheless taxed the costs of one copy of depositions taken by defendants. Copies of depositions taken merely for investigation, or pre-trial preparation, are not properly taxable. Bank of America vs. Loew's International Corporation, 163 F. Supp. 924, 930-931 (S.D.N.Y. 1958); Perlman vs. Feldman, supra. Appellees used such depositions at trial only in argument upon the introduction of the Alpine deposition - it was not used in trial - and in one limited instance each for the impeachment of Mr. Boyd and of Mr. Freeman. Such limited use should not authorize granting appellees costs for all copies of the depositions they took; the rest of which were in no way utilized at trial (for impeachment or otherwise).

Having copies of appellants' exhibits, which were lodged in Court from a time prior to trial, may be a convenience to appellees, but the incurring of such costs does not meet the test of 28 U.S.C. §1920(4) that such be "necessarily obtained." Instead, this item of pure convenience falls squarely within the proscription stated so clearly by the Supreme Court in Farmer: There was no showing by appellees that it was necessary to have copies of all such exhibits in the offices of counsel. For such failure, the allowing of these costs was also improper. See Perlman vs. Feldman, supra, at pages 112-113.

Taxing the costs of copies of pre-trial hearings also falls within an abuse of discretion, even prior to the policy stated in the Farmer case. As stated by Judge Hincks in Perlman vs. Feldman, in disallowing similar costs (116 F. Supp. 102 at 11

" . . . None of these hearings involved the taking of evidence; the transcripts, which were furnished by the official court reporter, include only argument of counsel and colloquy with the court . . . No showing has been made of any necessity for these transcripts. It appears to me that the ensuing memorandum of decision or order of the court served every need . . . To tax such items would be to encourage a needless addition to the costs of litigation which as applied to subsequent cases might well reach disproportionate dimensions." (Emphasis added.)

Allowing R.C.A. to recover the travel expenses of its witness to come to San Francisco for a deposition transgresses the holding in Farmer, as well as prior rulings in this Circuit. In Farmer, it was observed that as under Rule 45(e), a subpoena cannot be served outside the district, more than 100 miles from the place of trial:

" . . . (M)any decisions of the district courts and courts of appeal have held that since witnesses cannot be compelled under this rule to travel more than 100 miles, a party who persuades them to do so by paying their transportation cannot have these expenses taxed as costs against his adversary." (379 U.S. 227 at 231).

As Justice Goldberg noted in his concurring opinion in Farmer (379 U.S. 231, at 239), the prevailing rule in this Circuit is that mileage allowable should be that which was traveled within the district, or actual mileage traveled in and out of the district up to 100 miles, whichever is the greater. Kemart Corp. vs. Printing Arts Research Laboratories, Inc., 323 F.2d 897, 904 (9th Cir. 1956). R.C.A. sought, and recovered as costs, total expenses of \$125.83, for voluntarily bringing Saxon from Las Vegas to San Francisco (including lodging and meals). (R. 1999.) It was clearly against established law to have allowed such claims as taxable costs.

CONCLUSION

For the reasons given herein, the judgment of the Court should be reversed as to all appellees, costs reduced, and this case remanded to the District Court for further trial.

DATED: The _____ day of October, 1967, at San Francisco California.

Respectfully submitted,

MAXWELL KEITH
EDWIN C. SHIVER

By _____
MAXWELL KEITH
Attorneys for Appellants.

FELDMAN, WALDMAN & KLINE
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL KEITH
Attorney for Appellants.

J. B. Sayre

MR. R. H. QUAYLE
W. C. FISHER
H. P. BULL

July 15, 1960

Nema



Gentlemen:

Attached is a copy of a memorandum which was handed out at yesterday's NEMA meeting for consideration by the appliance manufacturers.

I will discuss this with you in our Monday morning meeting.

Sincerely yours,

ORIGINAL
J. B. SAYRE

JBS
ds

~~EXHIBIT NO. 1~~

APPENDIX B

EXECUTIVE MANAGEMENT RESPONSIBILITIES

IN MARKETING PRACTICES

The major appliance industry has not been considered as a "growth industry" since the middle '50's. This is quite a transition from the enviable position held by the appliance industry for the previous 20 years.

Up through 1950, there was a premium on appliance sales and management talent in other industrial fields. The situation no longer exists, as our industry, second only to automobiles and the durable goods field, has converted from a highly specialized sales group--utilizing merchandising practices that are a credit to American business down to a straight competitive price retailing operation, with little or no salesmanship and very little opportunity for profit at the manufacturer, distributor or dealer levels. This is quite a transition for such a short time. The attached chart reflects the magnitude of this downdraft.

The following analysis covers the contributing factors and the remedial action that can be taken:

1. Probably the prime reason for our present status is the intense competition in trying to "cutbid" each other to compensate for productive capacity well in excess of current market. Unfortunately, these tactics do not sell one more appliance.

The primary contributing factor to the present marketing situation is the manufacturer's approach to:

- a. Large volume retailers.
 - b. Apartment house-builder volume.
 - c. Trailers.
2. An area of opportunity to take corrective measures could be activated if manufacturers would follow the following simple rules applied to their distribution pattern with exclusion of government housing:
 - a. Establish distributor prices and dealer prices to be used with all retailers regardless of type or volume, and in no instance waiver from these established prices (This recommendation is only living up to the law of the land and conforming to Robinson-Patman and the Clayton Act.)
 - b. No quotations to any type of distribution (excluding government housing) at less than distributor or quantity dealer prices, whichever is preferred.
 - c. All co-op advertising and supplemental advertising funds not to exceed 5% of national rate to be used for "bona fide" advertising, without exception. This would completely eliminate some the pseudo practices where advertising funds are made available for window rental, warehouse space, display space, and other practices that result in demand price adjustment rather than advertising.
 - d. Promotion fund not to exceed 1% of maximum dealer billings, and in all instances to be spent only with the dealer erecting a fund, without exception. If the dealer does not utilize the fund, then the balance will revert back to the factory.

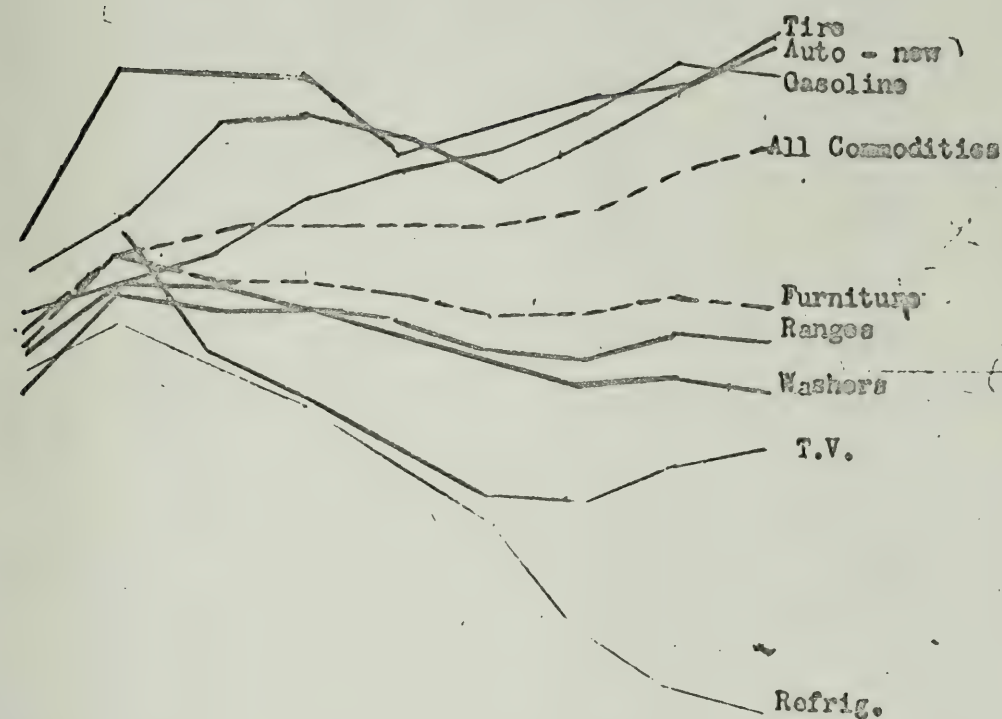
If consideration could be given to these recommendations, then the application depends entirely on competence, integrity and complete belief in each other as to the administration of the program.

It is assumed that the pricing programs on each individual manufacturer's product are competitive, giving consideration to product differences and features, and, of course, it would be incumbent to bring them in line with competition before this recommendation would become practical.

CONSUMER PRICE INDEX

YEARLY TREND

1947-1949 = 100 PERCENT



50 | 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58

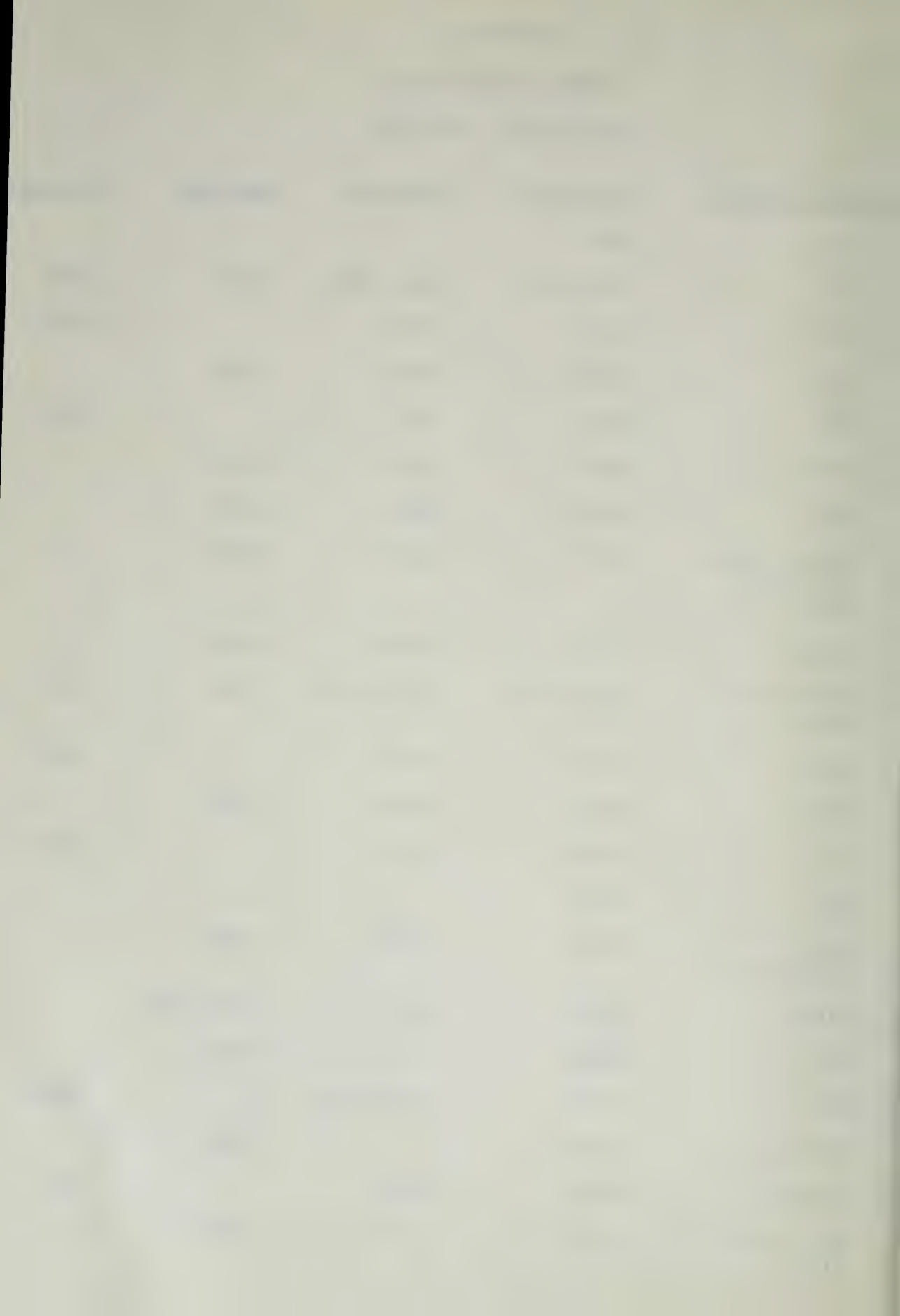
Nat. Ind. Conf. Bd.
U.S. Dept of Labor
Bureau of Labor Statistics

APPENDIX C

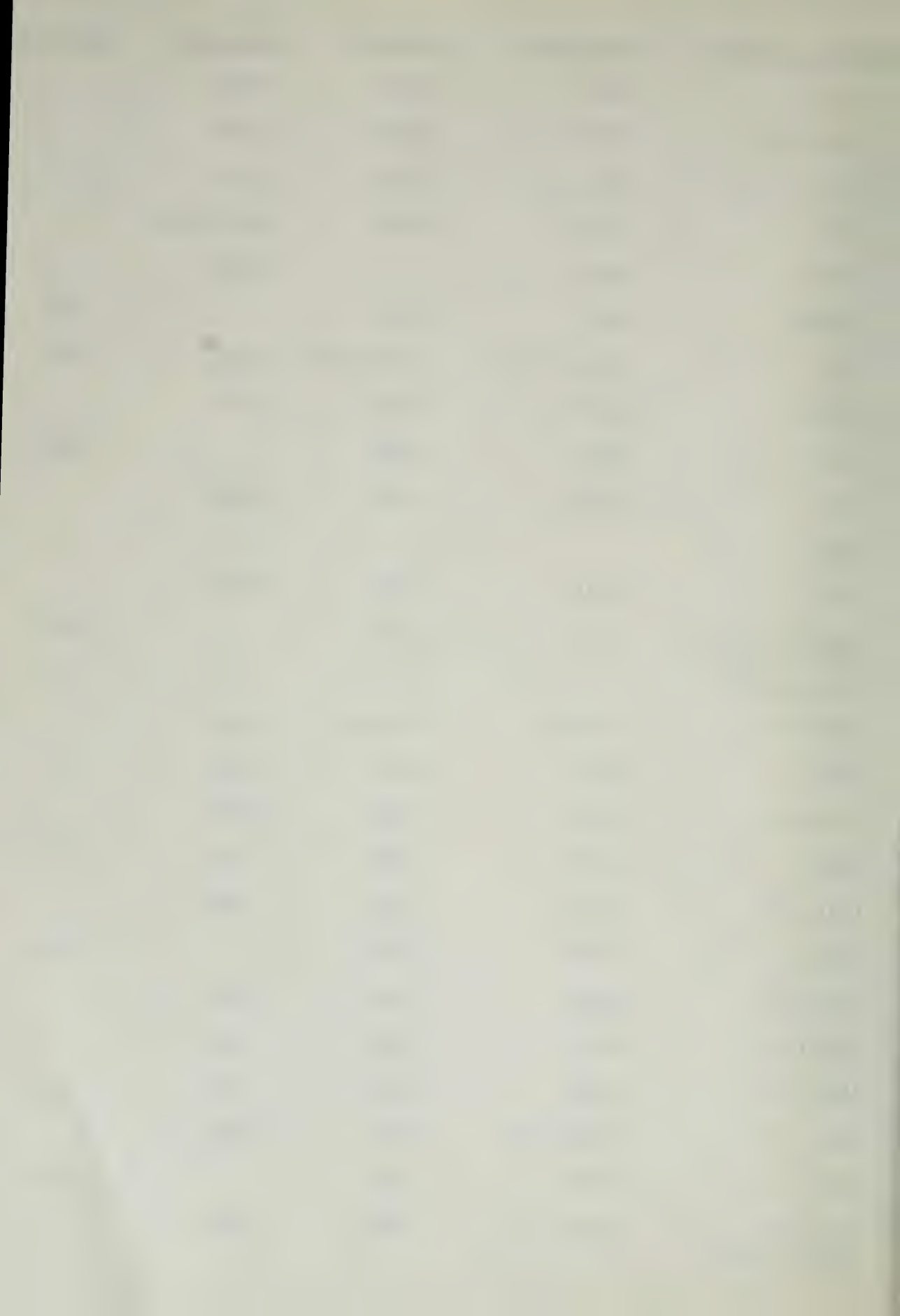
TABLE OF EXHIBITS

APPELLANTS' EXHIBITS

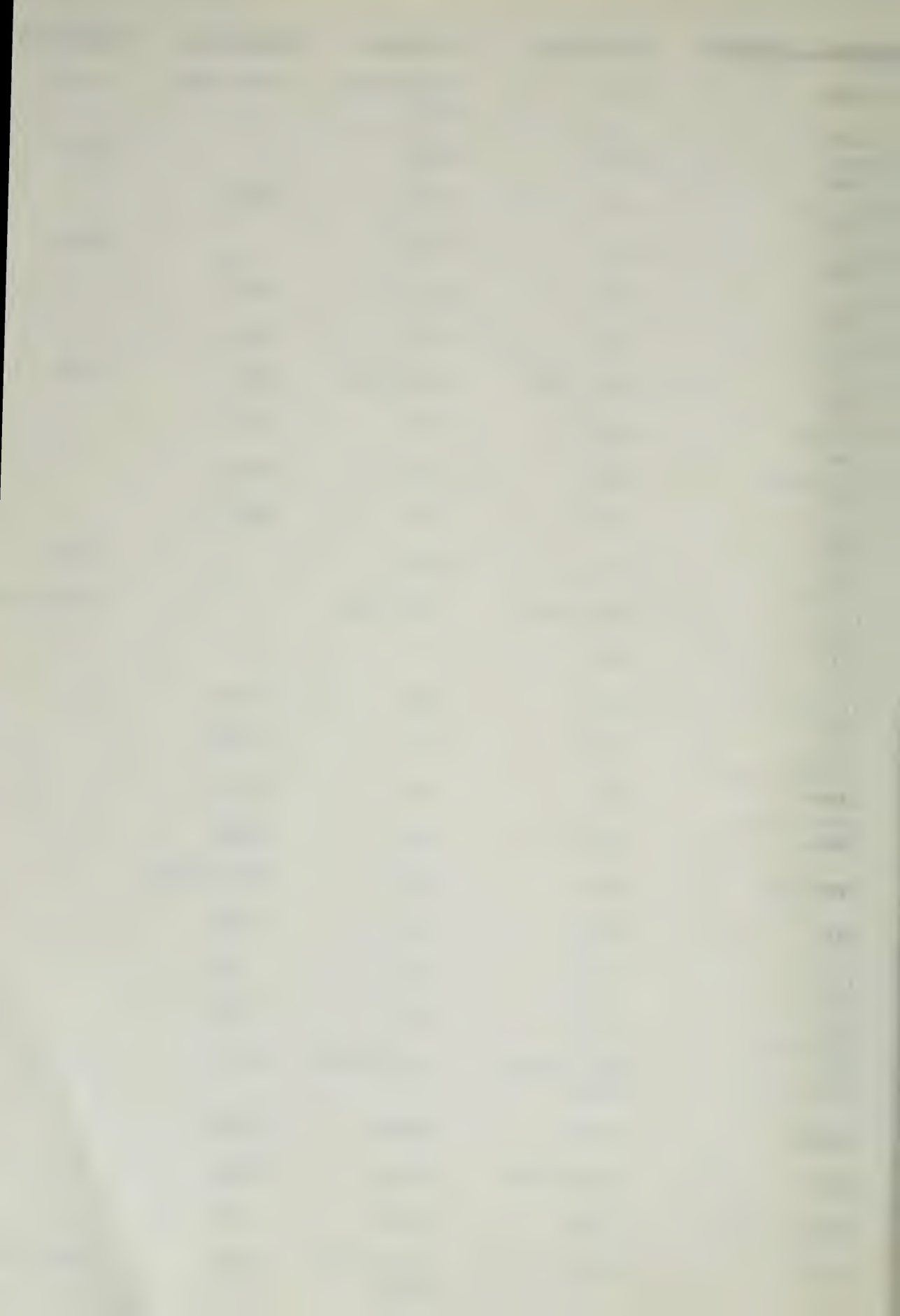
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2	2656; 3486	2656; 3486	3486	2656
7	6478	6478		6479
13	3059	3059	3060	
14	5185	5187		5187
26-A; B	3809	3810	3811	
28	3099	3099	3099	
31A-C; 32A-C; 33A-B; 33C; 34A-B	3047	3047	3047	
35; 36	4208	4208	4208	
46A-B; 47A-B; 48A-B	2392; 2712	2392; 2712	2712	2393
49; 51	2677	2677		2679
50A-G	2793	2793	2793	
52	2396	2399		2399
53	2671			
54-59 (except 58)	3626	3627	3628	
62A-F	3853	3854	3854; 3858	
63	3856		3858	
64	3831	3831; 3861		3862
65; 66A-B	3857		3858	
68; 69; 85	3837	3841		3841
70-72; 75; 77-79	3751	3751	3753	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
73	3826	3826	3827	
88;90;91	1194	1194	1196	
92	1211	1213	1214	
93	1258	1258	1259;4656	
94A-G	4652		4656	
97A-B	4807	4808		4808
99	1234;4562	1237;4563	4563	1237
101-103	1196	1196	1197	
106A-D	2861	2861		2861
134	3308	3308	3308	
148				
149	5281	5281	5283	
156A-E;155A-E; 154A-E;153A-F; 152A-H;150A-G	5274	5274		5275
157-159	6146-A	6146-A	6147	
160B	4219	4220	4220	
160D;F;G	4219	4221	4221	
160E	4590	4590	4590	
161A-AF	5047	5048	5048	
163	3298	3297		3300
168-173	2801	2804	2804	
174-183	3852	3852	3853	
196-199	2416	2418	2418	
204	1454;4047	4048	4048	
209	1458	1458		1459
210-226 (except 212; 222)	1694	1694	1697	



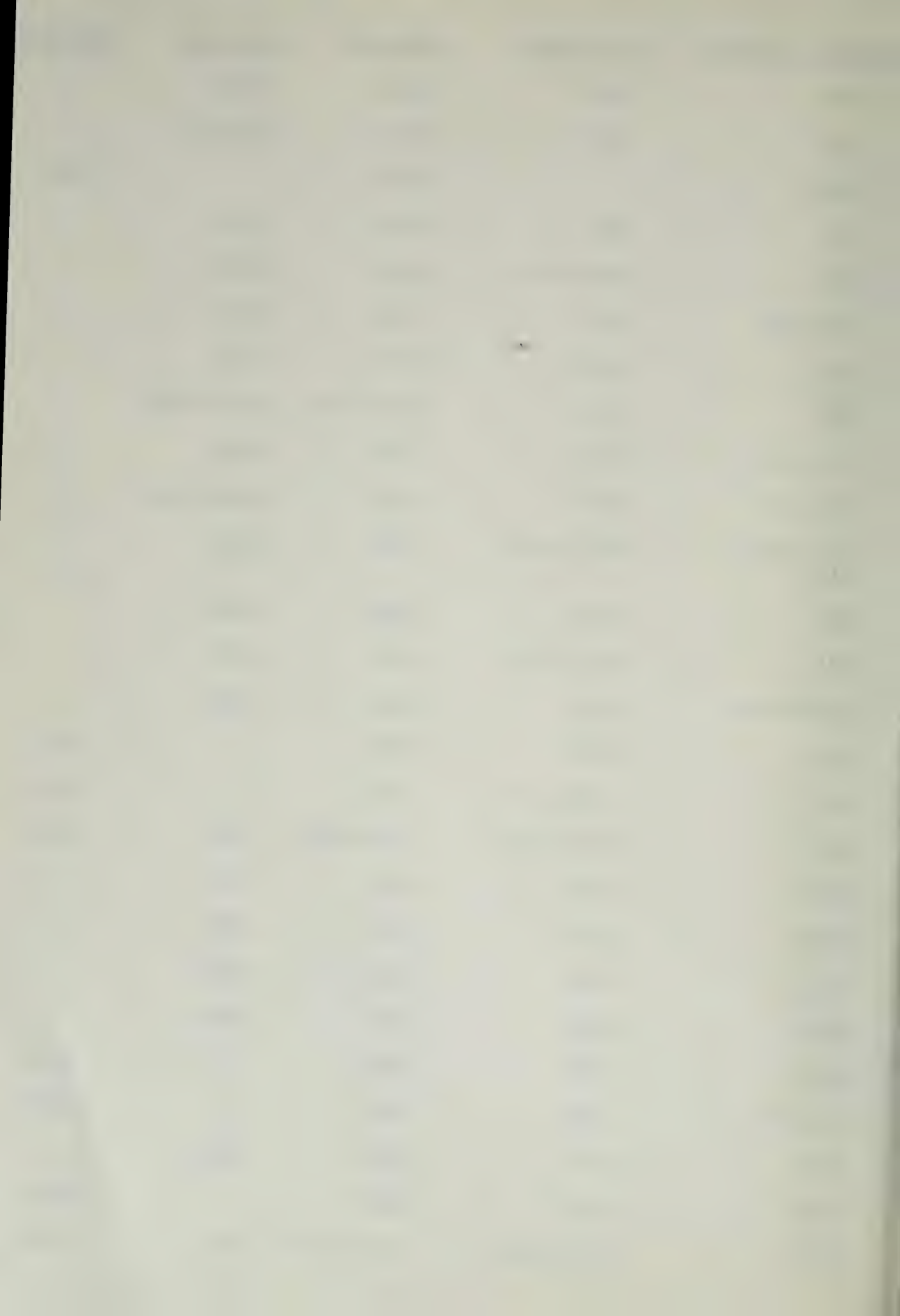
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220	1693	1694		1697
227-1-4	1692	1692	1693	
234	4263	4264		4264
256	4301	4301	4301	
272-276	1672	1673	1674	
294	2381;2585	2382;2585	2586	2382
295-299	1038	1072	1072	
300-300A	1406	1406	1407	
301	1407	1407	1407	
307A	3615	3615		3615
310	1248;4500	1250;4924		1251;4924
311	4936			
313-316	1107	1108	1108	
318-321	1706	1710	1711	
322	3366	3367	3367	
325A-B	2347	2347	2348	
327-333	6519	6519	6520;6842	
334	868	871	871	
337	708	714	714	
338	784	785	787	
339	1480;3086; 6089	3093;6093	6093	3113
339A-B	3100	6093	6094	
340	1481;6088	6093	6094	
342	664	664	664	
343	4549	4549;4570; 6496	6508	4550;4570



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
344	4549	4718;6496	6508	4718
345	1985	1985;1991		1992
346	1802;1834	1806;1835		1806;18
348	3167;4600	3167;4603	3167	4604;46
349	268	4650	4651	
350	268	276;4650	4651	277
352	6155;6483			6485
359	4942	4942		4942
363		4747		4747
364	4497	4498;4747		4498;47
365	4498	4498;4747		4498;47
378A-B				6599
384	377;1597	382;1598		383;15
390	386	386		386
391	1523	1756		1757
392A;393A; 394A-B				6599
395;395A 400	414 1633;2342	415 2342;2345		416 2343;23
402	1634			2345
403	1157;1247	1157;1247; 1313;4935		1157;12 1313;49
404	1636;5695	5695	5698	
407A-B	2282	2283		2283
408A	2288	2289		2289
420	2611	2612		2612
422	935	936;4277	936	4277
423-424;426	935	936	936	
428E	940;3128	940	941	

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430	1936	1937	1938	
430A				
431	3029	3029;6468	3029	6469;68
434;435; 444; 445;448	340	350	350	
450A-B; 451A-B	345-346	348	350	
453	380	382		382
454	1847	1847		1848
454A	1570	1864		1865
455	1717	1736;2235	2235	1736
463	1722	1722	1722	
465	4121	4122	4122	
466	1623	1623		1623
468	1620	1620	1621	
475	3784	3785	3785	
476;478	3796;3797	3795		
479	6152	6152;6483		6159
480	6153	6154		6154
481	6147	6148;6483		6148;64
482A;D	3184	3192	3192	
483	3773	3775	3775	
487	4230	4230	4230	
491	4024	4026	4026	
492A;493A; 494A	4223	4225	4226	
496A	4238	4238	4239	

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504	5191	5191	5190-A	
504B		5836		5836
509	5237	5237	5238	
510	4331;4348	4332	4332	
511;513	5239	5239	5239	
512	4332	4332	4333	
514	4161	4162;4168	4163;4168	
515-520	4165	4166	4168	
521-522	4166	4166	4166;4168	
523;524A; 541A	5955;5956	5956	5957	
525	3069	3069	3069	
526	5547;5575	5575	5575	
527A;528A	5458	5458	5458	
528	3206	3207		3207
529	990;5471	5472		5473
530	5464;5519	5465;5520	5520	5469
536A	3074	3077	3077	
536C	3072	3073	3073	
537	5457	5457	5457	
538	4478	4477	4478	
542	5794	5794		5795
544;536	3080	3080		3082
547A	4452	4452	4454	
548A	4452	4452		4454
551	2379;2582	2379;2584	2586	2380;25



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556	2616	2618	2618	
565	3342	3342		3343
567	3329	3329	3330	
568	5790		5791	
574-575	1303	1305	1306	
592	589	590		590
603	5003	5003		5004
627-630	3355	3354; 3364		3355; 33
631-636	4254	4254		4256
637	2438; 3983	3983	3983	
638	1461	1484	1484	
639-640	179; 1114	179; 189; 1114	1114	190
641	1101	1118	1118	
643	2374; 2689	2376; 2689	3028	2376; 26
644	1024; 2596; 2758	1026; 2596; 2736; 2758	2758	1027; 25 2737
645	2374; 2689	2376; 2689		2376; 26
646A-B; 647; 648	3822	3822	3823	
654A; 656A-C	3709	3709	3710	
655A-C	3708	3708	3709	
665	282; 1494	282; 1495	1498	282
667	289	288	288	
668				
676	5110	5110	5114	
680-681	5101	5103	5104	

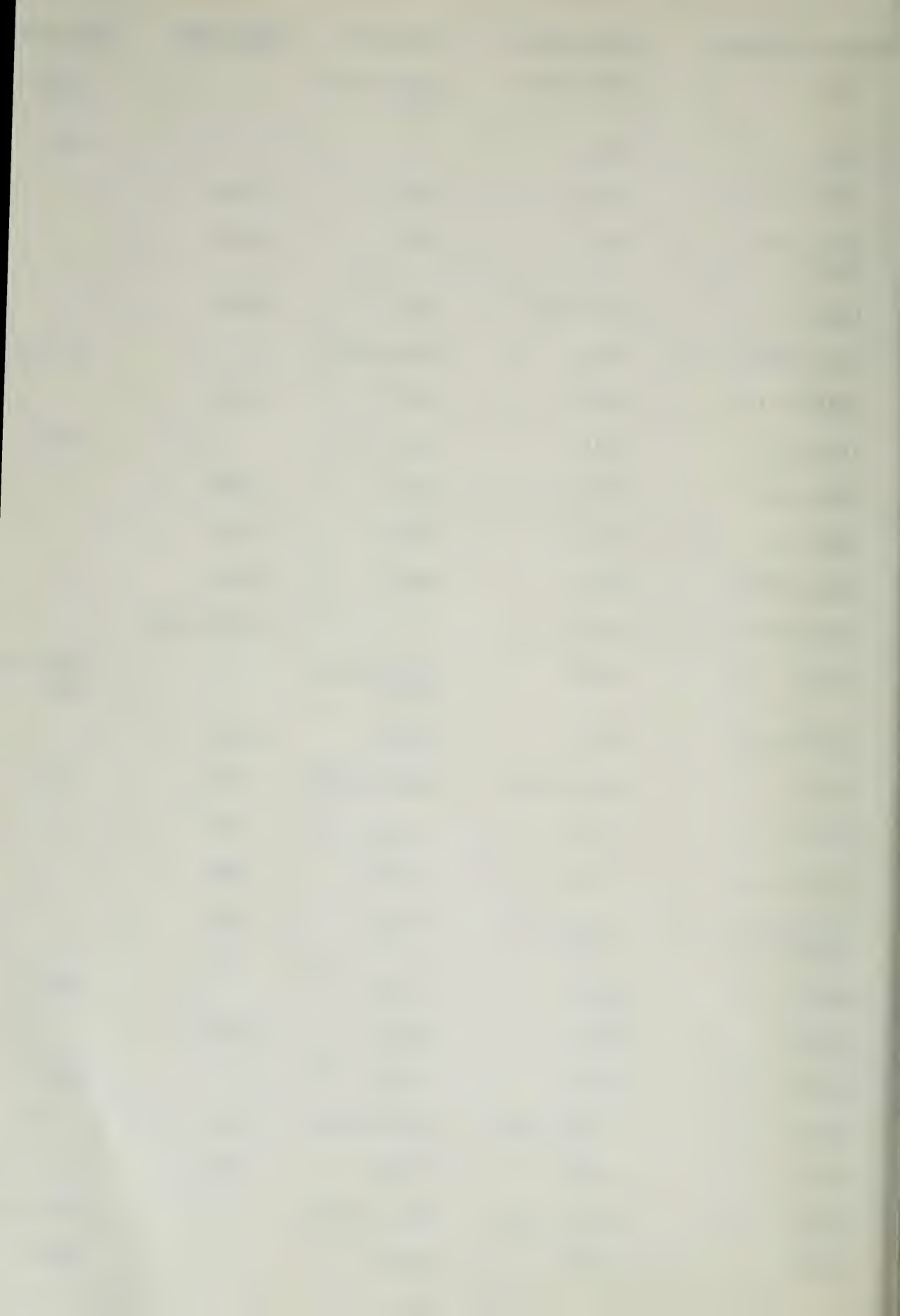
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686A-E	1277	1277	1278	
687A-C; 688	5092	5092	5094	
689A-B	1271	1270	1271	
690	6142	6142	6142	
691	6143	6143	6143	
697-699	780	779	780	
698C	1259	1260	1261	
708	739	739	739	
712-713; 715	802	802	802	
714; 717	737	738	738	
719-721; 727; 723-724; 729	1374	1375	1375	
730; 769-770	1127	1128	1130	
731-736 (except 733)	868	871	871	
737	6515; 6842			6842
739-740	1365	1365	1366	
772-773	1117	1117	1117	
780	4649	4649		4650
781	777	777	777	
783-784	4417			4417
787	1020; 4501	1022; 4927		1023; 4501 4928
788; 790	4502	4502		4503
789	4502	4502; 4930		4503; 4930
791	1205	1206		1207

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794-796	1136	1136	1137	
798-802	1142	1142	1143	
866A-B	1092	1092	1092	
921;928;933; 934	754	755	755	
937	763	764	765	
1034-1035	1489	1489	1489	
1059B	1491	1489	1489	
1061-1062	1489	1489	1489	
1072-1073;1079; 1080;1089	1120	1121		
1081	1492	1489	1489	
1094-1107	1467	1469	1070-71	
1159	4649	4649		4650
1161	605	605	606	
1165	4952	4953		4953
1167;1169	4955	4956		4957
1168	4957	4958		4959
1184	5332;6520	5332		5333;65
1192-1194	839	843	843	
1207	1793	1792	1793	
1213	1790	1790	1791	
1215	1786			
1219;1226	3355	3355;3364		3355;33
1230A	1832	1830	1830	
1261-1262	3355	3354;3364		3355;33
1271A-B	2088	2091	2091	

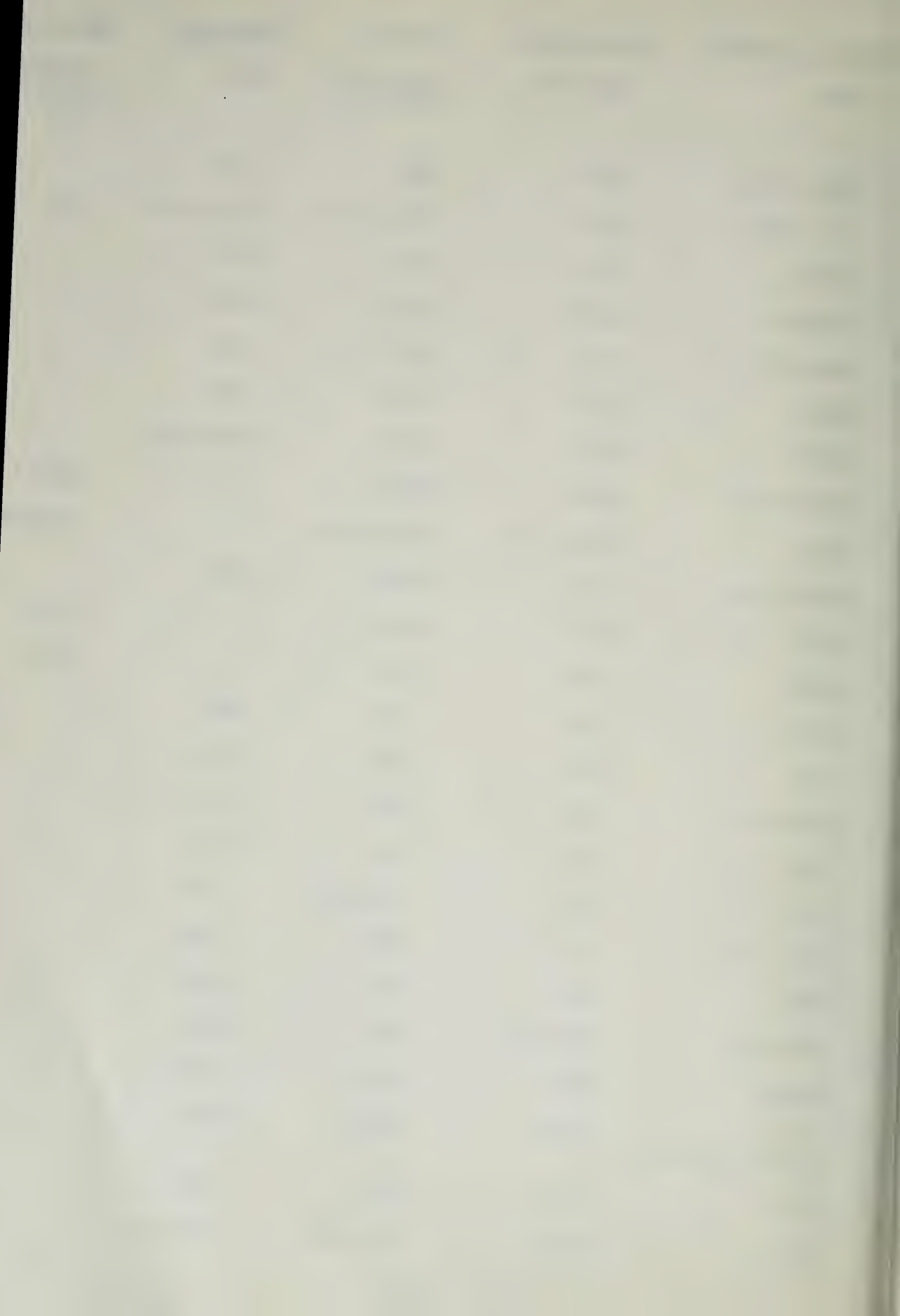
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1277A;1278A	2084	2085	2086	
1297	4466	4469		
1360;1362	1825	1826	1826	
1365-1366	4940	4940		4941
1369	3824	3824	3824	
1484-1486	3770	3767	3769	
1488	6305	6305		6309
1489	6302	6305		6305
1490	6310	6323		6324
1491	6362	6362		6362
1500-1	6363	6363		6363
1523	3291;5741	5745	5746	
1524	453	454;484	454;486	
1525	192;453	194;454; 473;483	454;473; 484	195
1560				
1561-1578	6365	6382		6401
1579-1681	6401	6402		6402
1691	6115	6122		6116
1692-1693;1695	4977	4977	4978	
1684;1697; 1698;1701	5957	5957	5958	
1703	1220;5972	1220;1245; 4969;5599; 5972	1220;5973	1225;124 4969;560
1704	5972	4969;5972	5973	4969

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1706	5972	5972	5973	
1707-1708	4911	4912	4912	
1709	5961			
1710-1711; 1715;1716; 1718	5144;5150	5144	5145	
1714	5144	5144;5146		5147;51
1721	5144;5154	5144;5944	5157;5944	5145
1722	5144;5154	5144;5944	5944	5145
1740	3826	3826	3827	
1745				
1750	1614	1615;1629		1615;16
1754;1756	2394;5976	2395;5821 5976	5977	2396;58
1757;1758	5976	5976	5977	
1759-1760	2851;5977	2853;5823; 5977		2853;58 5978
1761-1762	5823;5977	5823;5977		5823;59
1763	5962	5968	5969	
1769	3004	3004		3005
1771	3004	3004;5818	5818	3005
1772	3001	3001;5395	5396	3002
1773;1775	2621;5950	2621;5950		2623
1774;1840; 1702	5969	5970		5970
1783	3696	3696	3696	
1784A-B	3742	3742	3742	
1785	3850	3850	3850	

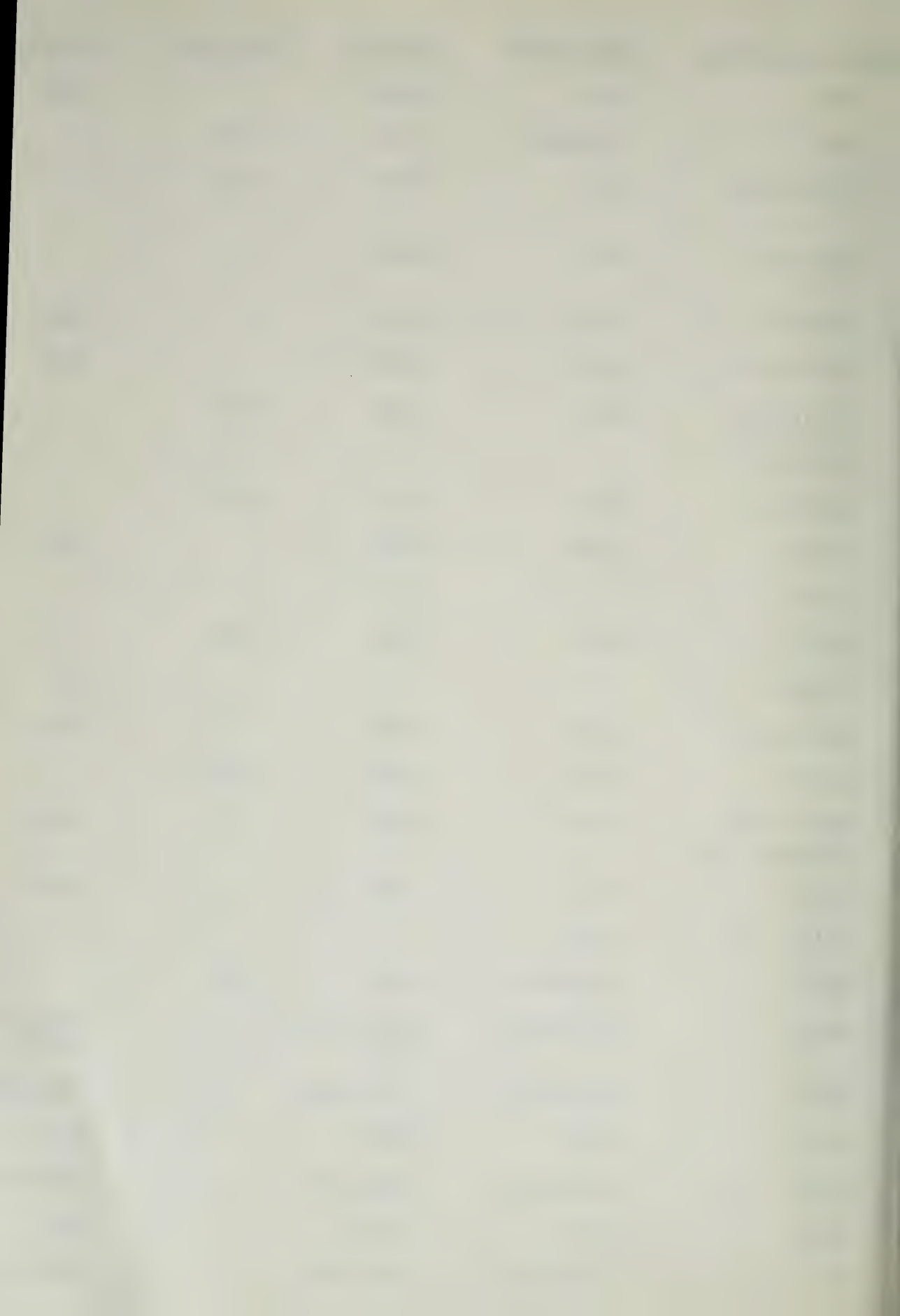
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1789	3563			3570
1790	1082	1084	1084	
1801;1803- 1804	5975	5975	5976	
1808	5627;5915	5915	5916	
1815-1817	5978	5978;6176		5979;61
1818-1819	5965	5968	5968	
1827-1;2	3945	3945		3946
1827-16	5729	5729	5729	
1827-17	5730	5730	5730	
1828-1829	4030	4031	4036	
1842-1846	6840		6508;6841	
1846	4598	4598;4964; 4997		4599;49 4997
1847-1898	1086	1087	1087	
1899	3606;3848	3606;3848	3849	3606
1901	876	876	878	
1903-1908	792	796	796	
1909-1912; 1913	817	817	818	
1917	4472	4473		4473
1918	3212	6538	6539	
1919	6533	6533		6534
1920	874;3471	874;3472	3472	875
1921	873	873	874	
1922	2401;2659	2401;2660		2401;266
1923	2659	2660		2661



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
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1926-1931	863	863	865	
1933-1935	5022	5023; 5142	5143; 6411	5023
1933DF	5024	5143	5143	
1935Q-R	5130	5130	5132	
1936A-D	631	632	634	
1937	817	817	818	
1938	6539	6539	6540; 6853	
1939-1942	2856	2857		2857
1941	2855; 6562	2856; 6563		2856; 65
1943-1944	3842	3842	3844	
1945	3611	3611		3612
1945B	3615	3615		3616
1946	863	863	865	
1947	1229	1229	1229	
1948A-AV	688	689	692	
1950	741	741	743	
1952	743	743; 753	753	
1953-1954	725	726	727	
1955	823	823	824	
1956A-AF	596; 610	615	615	
1956J	596	599	599	
1957 (except DC-DE)	819	819	822	
1958	847	847	848	
1959	849	849; 860	850; 860	



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
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1963	212;634	638	638	
1964AZ-BF; A-V	1723	1728	1730	
1964W-Z; AA-AY	6535	6535		
1985A-B	4256	4258		4259
1986-1999	4260	4260		4260
2058;2060; 2061-2064; 2068;2070	4005	4008	4010	
2059A-B	4017	4017	4017	
2069A-B	4018	4021		4022
2074				
2081	3997	3998	3998	
2090A-G				
2092-2099	6469	6469		6472
3005	1213	1213	1214	
3000-3008 (except 3005)	6469	6469		6472
3009	3510	3509		3510
3010	3036			
3022	3039;6475	6475	6843	
3024	3511;6475	3511;3521; 6475		3511;3521; 6477
3026	3508;6475	3508;6475		3509;6477
3028	6475	6475		6477
3029	3520;6475	3520;6475		3520;6477
3030	6475	6475		6477
3032	3514;6475	3518;6475		3519;6477

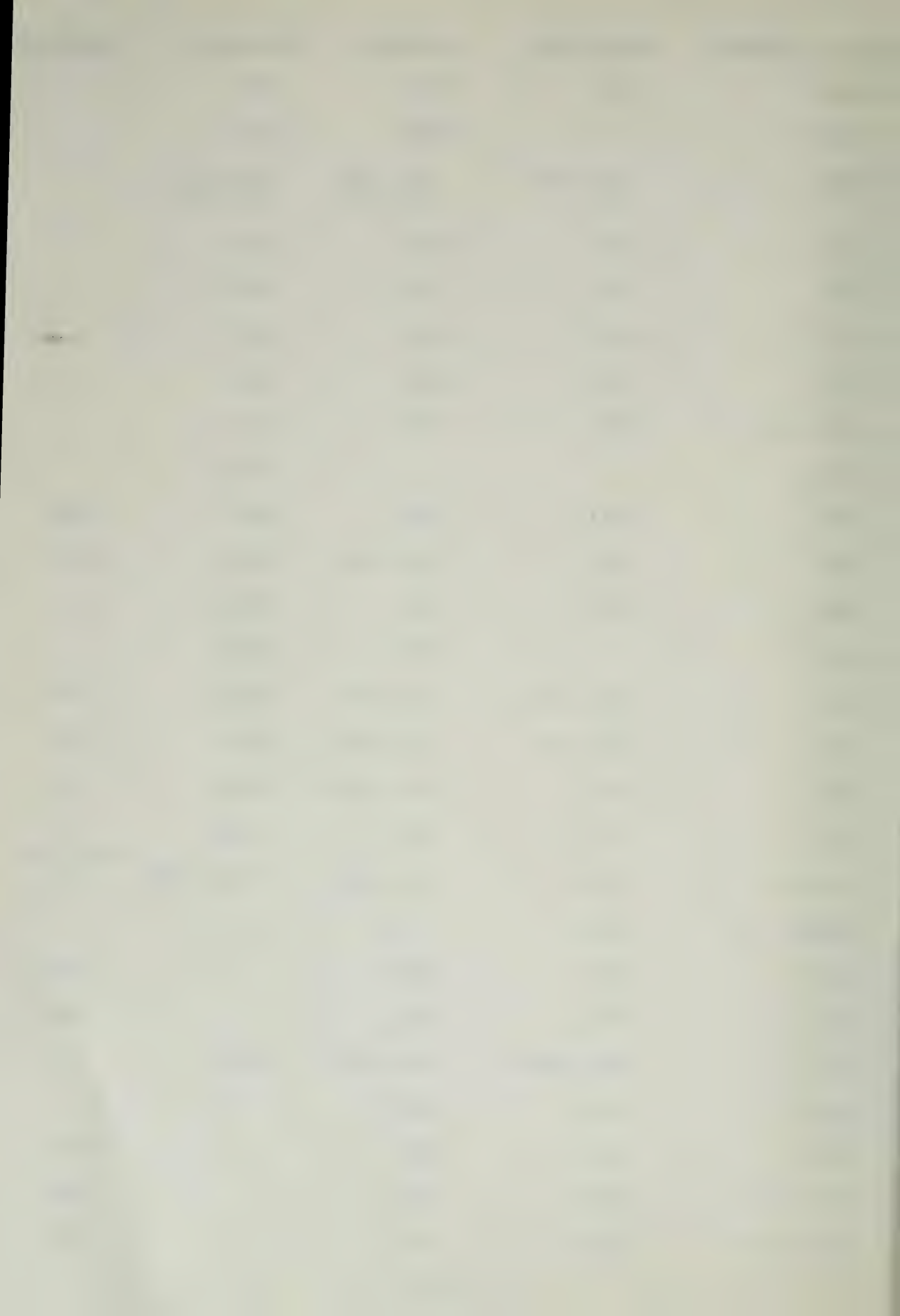


<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
3036-3037	6475	6475		6477
3041-3044	6135;6483	6135;6480		6483
3049	5824	5825;5978		5825;597
3051-3052	866	866	866	
3054	656	659	661	
3071	5551	5585;5592		5592
3076	2790	2791		
3082	404	406		406
3085	529	530		530
3086	525	528;678		528;678
3095	3019	3019		3113
4010	2730;2981	2732;2980	2982	2732;299
4011;4014	2976;2978	2977	2978	
4019	2993	2993	2993	
4023	2732;2980; 2986	2732;2980	2982	2732;548
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4029	2716	2716	2716	
4034-4037	2996	2996	2996	
4038	5817	3004;5817	5818	3005
4041-4042; 4046-4052	2561	2561		2562
4053	2865	2865		
4054	1371	1372		1374
4055	2940	2941;2958	2958	2943
4056-4057	2965	2965		2966
4058	2633;2793	2792	2793	
4059	2634;2799	2799	2799	

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4079-4080	2629	2630		2630
4082-4083	2624			
4084A-C	2785	2789		2789
4085	2860	2861		2861
4089	2702	2703	2704	
4092A-C	2698	2699		2700
4096B	2964	2965	2965	
4098B-1; G-1;H-1-H2	2737;2748; 2751;2755	2746	2746	
4098X-Y	2737	2738		2738
4099A-B	2759;2762	2760	2768	
4099C-G	2767	2767	2768	
4101	2770	2770	2770	
4102	2774	2777	2778	
4108	2626			
4112	2839	2840		2840
4113	2841	2841		2845
4119	6592	2863;6592	6595	2863
4120A-AK	2864	2865		2865
4127	5231	5231	5231	
4128	4138	4138	4138	
4129A-F	2011	2011	2011	
4130A-D	1998	1999	1999	
4131-4135	5249;5250	5249	5250	
4140	4334			
4141A-B	5276	5276		5277
4142	450	450;3897		450;3899

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4153	1119	1119	1119	
4154	6494	6495		6495
4161	1118	1118	1119	
4164A-F	3346	3346	3347	
4165	3352	3353	3353	
4170	1555;1910	1558;1910		1559;19
4176				
4178	2266	2267		2268
4178A-C	4100	4103		4104
4179;4287; 4178	6530			
4188D	3152	3152	3153	
4189	3156	3156	3157	
4196	6513	6513		6513
4201	5962	5968	5969	
4207A-B	6138	6138	6139	
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4231A-C	5147	5147	5148	
4236C-U	5097	5097	5098	
4237-0-1 to U-21	5107	5107	5108	
4257	2068	2068	2070	
4266	6513	6513		6513
4267A	3055	3057	3058;3061	

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4268A-T		3119	3120	
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4270	4239	4238	4239	
4271	5237	5239	5239	
4272	5239	5240	5240	
4273	5240	5240	5241	
4274-4277	5970	5971	5971	
4278A			5458	
4275	5241	5241	5242	5243
4280	3353	3353;5789	5789	3353
4282	5973	5973	5974	
4283		5975	5976	
4284	2733;5812	2734;5812	5813	2734
4285	2735;5817	2735;5817	5817	2735
4286	3001	3001;5384	5385	3002
4297	767	767	768	
4301A-B	388	387;5942	388;5946	Stricken 390
4309B	5334			
4309D	5338	5338		5338
4328	2636	2642		2642
4330	6483;6836	6836;6483	6487	
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4336-4337	6360	6360		6360
4339-4340	6361	6361		6361



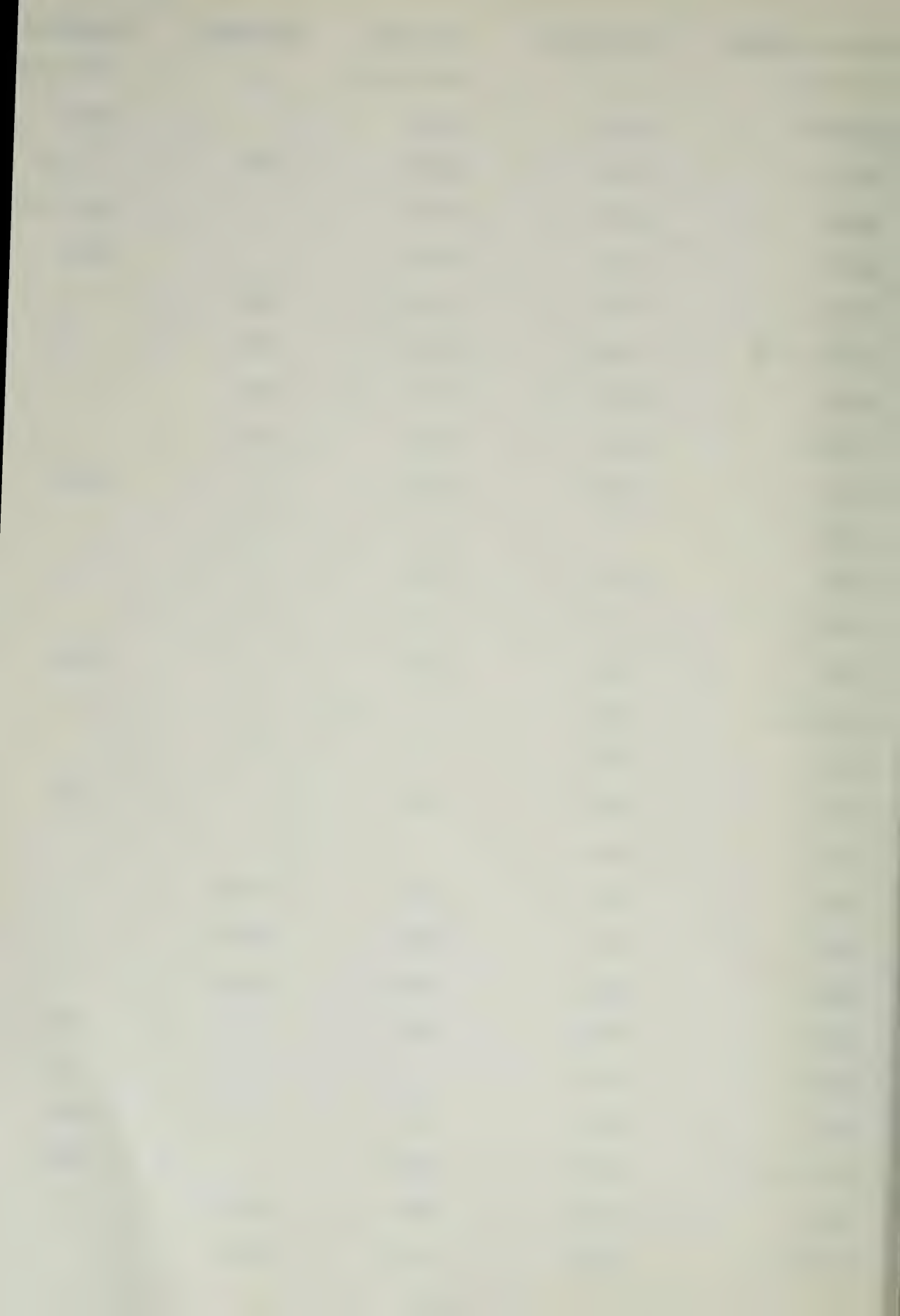
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4345	6845		6845	
4346	720	720	721	
4347	718;864	864	866	
4348	358	374		
4349	1072	1073	1073	
4350-4351	693;698	695	697	
4352-4353	703	701	702	
4354	714			
4355	1393	2650	2651	
4357A-B	2691	2692	2693	
4359-1	1387	1392	1393	
4362	1510	1510		1512
4363	1078	1079	1079	
4364	3258	3259		3260
4365	1163;1585	1166;1590	1166	W/D 1591
4368	1739	1739		1740
4369	1860	1860		
4370	1846	1846	1846	
4371	2004	2006	2008	
4372	2013	2015	2015	
4373	2148	2148		2148
4374	2335			
4375	2522			
4376	2539			

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4378	2579	2579		2579
4379	2677	2677		2677
4380	2957	2957	2957	
4381				
4382	3172	3172	3172	
4383	3210			
4384-4385	3223	3226	3226	
4386	3223; 3233	3233	3233	
4387A-B	3223; 3234	3234	3235	
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4389A-C	3223	3238	3239	
4390	3223	3238	3238	
4391	3223	3238; 6509		6511
4392	3223; 3253	3253	3254	
5014	3302	3302		3302
5015-5016	3368	3370; 3582		3372; 3582
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5018	3581	3581	3581	
5019	3602	3603		3603
5020	3603	3603; 3860	3860	3603
5021	3616	3616; 3738		3617; 3739
5022A-B	3641	3679	3679	
5023	3821	3821	3821	
5024	3895			
5025-5026	3975			



<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
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5028	4118	4119		4119
5029	4404	4404;5189		5190
5030	5247			
5031	4362	4362		4363
5032-5033; 5035;5044	6064	5258;6064		6064
5045	4383	4383;5268		4383;526
5046	4383;5266	4383;5266		4383;526
5047	5286	5281	5283	
5048	5287	5287	5288	
5049	5289	5289	5289	
5050	5452;5453	5453		5453
5051	5454	5454	5455	
5053B-C	5456	5456	5457	
5055	4247	4247	4247	
5056	4387;4409; 5280	5280		4390;528
5057	4409;4387			4390
5059	4811	4811		4811
5060	4553	4553		4554
5061	4783	4785		4785
5063	4480	4480	4481	
5064	4815	4817		4818
5065	4824	4824		4824
5066	4773	4777		4778
5068	4809	4809;6495		4810;6496
5069A-B	4804	4804	4825	

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
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5070E-F	4800	4801		4801
5073A-C	4891	4891	4892	
5074	5060	5060		W/D 5060
5077C-D	5053	5054		5055
5078	5120	5126	5127	
5081C-D	5040	5040	5041	
5084	5082	5082	5084	
5085A-D	5107	5107	5108	
5085	5068	5071		5076
5086				
5087	5118	5121		
5088				
5090	5350	5357		5357
5090-5100	5363			
5102	5494			
5103	5495	5495		5495
5104	5497			
5105	5500	5502	5504	
5107	5709	5709	5710	
5108	5916	5916	5916	
5109	5924	5925		5925
5110	5925			
5111	6056			6057
5112-5113	6084	6085		6086
5114	6305	6416	6416	
5114A	6405	6416	6416	

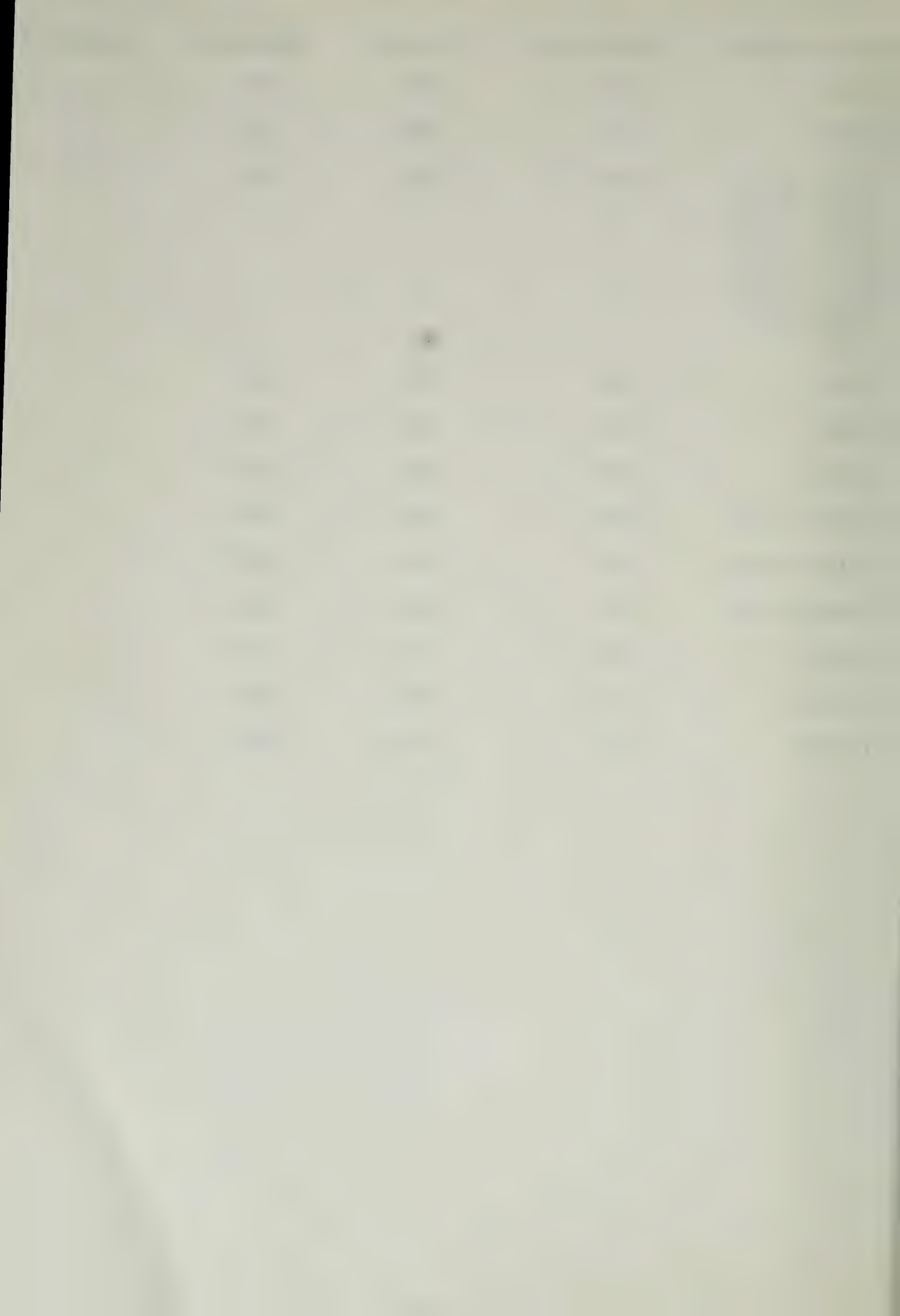


<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
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5116	6413	6437	6438	
5117	6600	6600		6601
5118	6599	6600		6601
5120	6521	6521		6521
5121	6522	6524	6524	

APPELLEES' EXHIBITS

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
DGE 8345F;G	3279;3280	3280	3280	
DGE 8350A-E	6034	6036	6036	
9000	2956			
9001	2360;2487	2361;2487	2487	
9002-9003	2928			
9006	2931	2933		2934
BW 9024	2161	2164	2164	
BW 9025	2869;6038	2870	2870	
BW 9026	2870	2871	2871	
BW 9027	2874	2875	2876	
BW 9028				
BW 9029	5527	5530		5532
11007	4823	4824	4825	
11008	6166	6167	6167	
WP 12154	5168	5169	5170	
WP 12155	5171	5172	5172	
13015-13112; 13114;13120- 13121;13124- 13127;13133- 13134;13138- 13140	3400	3400	3403	
13034	3393	3394	3394	
13035	3394	3395	3395	
13036	3395			
13037	3396	3396	3396	
13038	3397	3397	3397	
13039	3384	3384	3385	

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
13040	3385	3385	3385	
13041	3387	3387	3387	
13039-13041; 13043-13047; 13049-13054A; 13060;13069- 13070;13075- 13077;13090; 13091;13093- 13097	3399	3399	3403	
13074	3398	3399	3399	
13092	3391	3391	3391	
13098	3394	3394	3394	
13099;13100	3395	3396	3396	
13101-13104	3387	3388	3390	
13135;13136	3392	3392	3393	
13143	3373	3374	3374	
14003	4074	4074	4074	
14004S	1317	1318	1319	



APPENDIX D

Sections 1 and 2 of the Sherman Act provide, in relevant part (Sherman Act, enacted July 2, 1890, chapter 647; 26 Stat. 209 (15 U.S.C. §§ 1,2)):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal . . . "

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor"

Section 4 of the Clayton Act, enacted October 14, 1914, Chapter 323, § 4, 38 Stat. 731 (15 U.S.C. § 15), states:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefore in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, added July 7, 1955. Chapter 283, § 1, 69 Stat. 283 (15 U.S.C. § 15b), states:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA

CITY and COUNTY OF SAN FRANCISCO

)
)
)

ss.

Edwin C. Shiver, being first duly sworn, deposes and says:

I am a citizen of the United States, and a resident of the County of Alameda, State of California. I am over the age of eighteen years, and am not a party to the within-entitled action. My business address is 2700 Russ Building, San Francisco, California 94104.

On October ____, 1967, I served the within Opening Brief of Appellant, and Appendix A thereto, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail, at San Francisco, California, addressed as follows:

Bacigalupi, Elkus, Salinger
& Rosenberg
300 Montgomery Street
San Francisco, California

Newlin, Tackabury &
Johnson
727 West Seventh Street
Los Angeles, California

Cooley, Crowley, Gaither,
Godward, Castro &
Huddleston
333 Montgomery Street
San Francisco, California

Rogers, Clark & Jordan
111 Sutter Street
San Francisco, California

Cushing, Cullinan, Hancock
& Rotherth
100 Bush Street
San Francisco, California

Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California

McCutchen, Doyle, Brown,
Trautman & Enersen
601 California Street
San Francisco, California

DATED: October ____, 1967.

Edwin C. Shiver

Subscribed and sworn to before me
this ____ day of October, 1967.

NO. 20770

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SHOPPERS EXCLUSIVE, a)
California corporation;)
MANFREE, INC., a California)
corporation,)
)
Appellants,)
)
vs.)
)
GENERAL ELECTRIC COMPANY, a)
New York corporation, et al.,)
)
Appellees.)
_____)

Appeal from the United States District Court for
the Northern District of California

SPECIFICATION OF ERRORS

APPENDIX A TO OPENING
BRIEF OF APPELLANTS

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of Counsel

FILED

OCT 21 1967

WM B LUCK:CLERK

OCT 30 1967

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BRIEF OF APPELLANTSSubject Index

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The Trial Court erred in ordering a separate verdict on liability before allowing the jury to consider evidence of the damages suffered by the appellants	i
The Trial Court committed prejudicial error in not permitting appellants to introduce evidence or obtain judgment based on defendants' entry into vertical conspiracies to restrain and monopolize interstate trade and commerce, as alleged in the complaints	i
The Trial Court committed prejudicial error in dismissing appellee Norge Sales pursuant to motion for summary judgment, under 15 U.S.C. 15(b)	ii
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APPENDIX A

SPECIFICATION OF ERRORS

I

THE TRIAL COURT ERRED IN DIRECTING A VERDICT FOR EACH DEFENDANT IN A JURY TRIAL, AND IN DISMISSING APPELLANTS' COMPLAINTS AS TO EACH DEFENDANT

II

THE TRIAL COURT ERRED IN ORDERING A SEPARATE VERDICT ON LIABILITY BEFORE ALLOWING THE JURY TO CONSIDER EVIDENCE OF THE DAMAGES SUFFERED BY THE APPELLANTS

In the Further Pre-trial Order filed August 13, 1965,

the Court ruled:

"These issues which relate to liability shall be tried and determined by way of special verdict before the issue of damages is tried before the same jury." (R. 1608-1609).

III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT PERMITTING APPELLANTS TO INTRODUCE EVIDENCE OR OBTAIN JUDGMENT BASED ON DEFENDANTS' ENTRY INTO VERTICAL CONSPIRACIES TO RESTRAIN AND MONOPOLIZE INTERSTATE TRADE AND COMMERCE, AS ALLEGED IN THE COMPLAINTS

The Pre-trial Order of August 13, 1965 defined and

limited the issues to be tried as:

"3. The ultimate issues to be tried in these actions on the issue of liability are as follows:

a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?

b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy

prevent plaintiffs from obtaining television sets and major household appliances?" (R. 1608-1609).

IV

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN DISMISSING APPELLEE NORGE
SALES PURSUANT TO MOTION FOR SUMMARY
JUDGMENT, UNDER 15 U.S.C. 15(b)

V

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN EXCLUDING EVIDENCE OFFERED BY
APPELLANTS PROVING THAT EACH OF THE
APPELLEES HAD VIOLATED THE SHERMAN ACT
TO THE INJURY OF APPELLANTS

A. Evidence Pertaining To Appellee California
Electric:

1. The Court excluded evidence of admissions by

Mr. Joseph Valenson, appellee's sales manager, showing the existence of a conspiracy between the appellees and co-conspirators with the purpose and effect of depriving appellant Manfree of access to the major lines of the subject products. Appellants offered to prove the following admissions made to Mr. Bernard Freeman, an officer of appellants, in the factual context noted:

a. In October, 1962, Mr. Valenson telephoned Mr. Freeman, and stated that appellants had a "million dollar conspiracy case", that "lawyers were putting words in his mouth", and that "he couldn't take it any more" and was "willing to help" appellants. (Tr. 3565-3569, 3574-3579).

b. Mr. Valenson also told Mr. Freeman that members of his company had requested him to give false testimony in his deposition, and that they were afraid to have him testify for fear of what his testimony would show. (Tr. 3757-3762).

c. Mr. Valenson further admitted to Mr. Freeman that Mr. Muntain, appellee's salesman (Tr. 3933) calling on

Manfree (Tr. 3967-3971), had not told the truth about appellee's refusals to deal in his deposition (Tr. 5859-5863).

Appellants also offered these admissions in rebuttal to California Electric's defense that Manfree did not want to buy the Norge line (see Tr. 3967-3971). (Tr. 5859-5863).

Appellees' repeated objections to the introduction of this evidence, in substance, were that it was hearsay to all parties, Valenson's authority to speak for his company was not established, and that the admissions were not statements in furtherance of a conspiracy. (See Tr. 3574-3579, the transcript references above, and Defendants' Memorandum of the Inadmissibility of the Hearsay Declaration Attributed to Joseph Valenson (R. 1706-1723).) See, also, appellants' Memorandum in Support of the Admissibility of the Declarations of Joseph Valenson (R. 1742).

The Court ruled the admissions were inadmissible:

"THE COURT: . . . (B)ut it's also prejudicial, and because it is prejudicial and because it is not a statement in furtherance of conspiracy, I am not admitting it." (Tr. 5863).

2. The Court excluded the testimony of Mr. Rising, an officer of appellee (Tr. 3664), concerning the general practice of manufacturers in the major appliance industry to establish retail prices that must be shown in dealer advertising, in order for the dealer to obtain co-operative advertising credits from the manufacturer or its distributor. That testimony was:

"Q. (MR. KEITH): Now, Mr. Rising, are you familiar with an advertising - - with the co-operative advertising policy of California Electric Supply during this period '57 to '62?

A. In general.

Q. Didn't you have a policy which you would not give advertising credits unless the dealer advertised at the suggested list price of California Electric Supply or at no price at all?

A. General industry practice that the factory establishes a price that they will allow the cooperative advertising to be . . .

MR. LITTMAN: Your Honor, I will move to strike the witness's testimony.

MR. KEITH: Will you let the witness answer, please.

MR. LITTMAN: I will move to strike the witness's testimony because it is founded . . .

THE COURT: The motion is granted."
(Tr. 3813-3814).

3. The Court excluded evidence that appellee granted direct preferential and discriminatory arrangements to co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 68, 69, 85, 1789 and 5021. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
68, 69, and 85	no foundation (Tr. 3837-3841)	Tr. 3841 ("cumulative")
1789	irrelevant (Tr. 3570)	Tr. 3570
	Court's own motion (Tr. 3616)	Tr. 3616
	hearsay, irrelevant, no foundation (Tr. 3713-3718)	Tr. 3718
5021	irrelevant (Tr. 3750)	Tr. 3750
	hearsay and irrelevant (Tr. 3616-3617)	Tr. 3617

Appellants made offers of proof concerning Ex. Nos. 1789 and 5021; objections to 1789 as lacking foundation (Tr. 3727-3733A) and to 5021 as being hearsay and without foundation (Tr. 3737-3739) were sustained.

a. Ex. Nos. 68, 69, and 85 (A-0) are documents relating to Hale's "associate distributor" advertising funds for Philco products in 1962, showing a substantial over-expenditure of advertising funds in relation to credits earned.

b. Ex. No. 1789 is a letter of March, 1960 to Philco from its "sales assistant - area west", concerning "our problem with Hale's", describing a meeting between representatives of appellee and Philco where Hale's sizeable over-expenditure (above) was discussed, and Philco asked appellee to assume part of the sum of \$6,512.92 overpaid. It also notes that appellee reported spending \$25,000 to \$30,000 from co-operative advertising funds in 1959 to "keep this account alive" when Philco advertising support was "pulled", and that Hale was "sitting" on Philco inventory worth \$100,000.

c. Ex. No. 5021 is a May, 1960 letter from Valenson of appellee to Newman of Philco, forwarding a debit of \$97.83 to be paid by the factory for costs of a "dinner meeting" with Hale representatives.

B. Evidence Pertaining To Appellees Borg-Warner And Norge Sales:

(The Court held that there was sufficient evidence that Borg-Warner was responsible for the activities of Norge Sales to go to the jury. R. 1962.)

1. The Court struck Borg-Warner Ex. No. 9024, and the testimony of appellants' advertising manager, Mr. Joseph Mittelman, concerning Ex. No. 9024. The testimony appears at Tr. 2105-2123. The grounds for objection and transcript references are:



<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
9024	Offered by appellee (Tr. 2164) Motion to strike: hearsay, no authority for declarant shown (Tr. 6624, 6622-6630)	Admitted (Tr. 2164) Tr. 6630
	Motion to strike testimony on grounds above (Tr. 6855-6865)	Tr. 6865

Appellants moved for reconsideration of the order striking Ex. No. 9024, which was denied (Tr. 6845-6846).

a. Mittelman testified that he had a conversation on or about December 8, 1960, with Mr. Aro, classified advertising salesman for co-conspirator San Francisco Examiner, where Aro solicited appellants' advertising for the classified section (appellants were unable to get the Examiner to accept ads for customary placement). Although Aro took copy, he called Mittelman back to say that even those ads would not be acceptable; because the Examiner felt appellant U.S.E. was a "discount house"; its policy was not to accept discount store advertising; that ads from such stores would directly compete with advertising of regular downtown retail stores in San Francisco such as Hale, Macy's, The Emporium, and Roos/Atkins who did not want U.S.E.'s advertising in the newspaper. Aro told Mittelman he had checked all this out with people senior to him in the newspaper organization.

b. Ex. No. 9024 is a memorandum containing the substance of the Aro-Mittelman conversation, prepared at the latter's direction immediately after the conversation.

2. The Court excluded documentary evidence from the files of Borg-Warner, showing that it and appellees Hotpoint, Frigidaire, and other major electrical appliance manufacturers consciously planned to and did establish uniform retail pricing



for their products, and jointly established a fixed distribution system. This evidence is contained in Pl. Ex. for Id. Nos. 431, 3006, and 3007. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
431	irrelevancy and no foundation (Tr. 6461-6469)	Tr. 6469
3006	no foundation (Tr. 6469-6477)	Tr. 6477
3007	irrelevancy and no foundation (Tr. 6496)	Tr. 6496

Appellee stipulated that Ex. No. 431 came from the files of appellee Norge Sales (a wholly-owned subsidiary of Borg-Warner.) Tr. 6473.

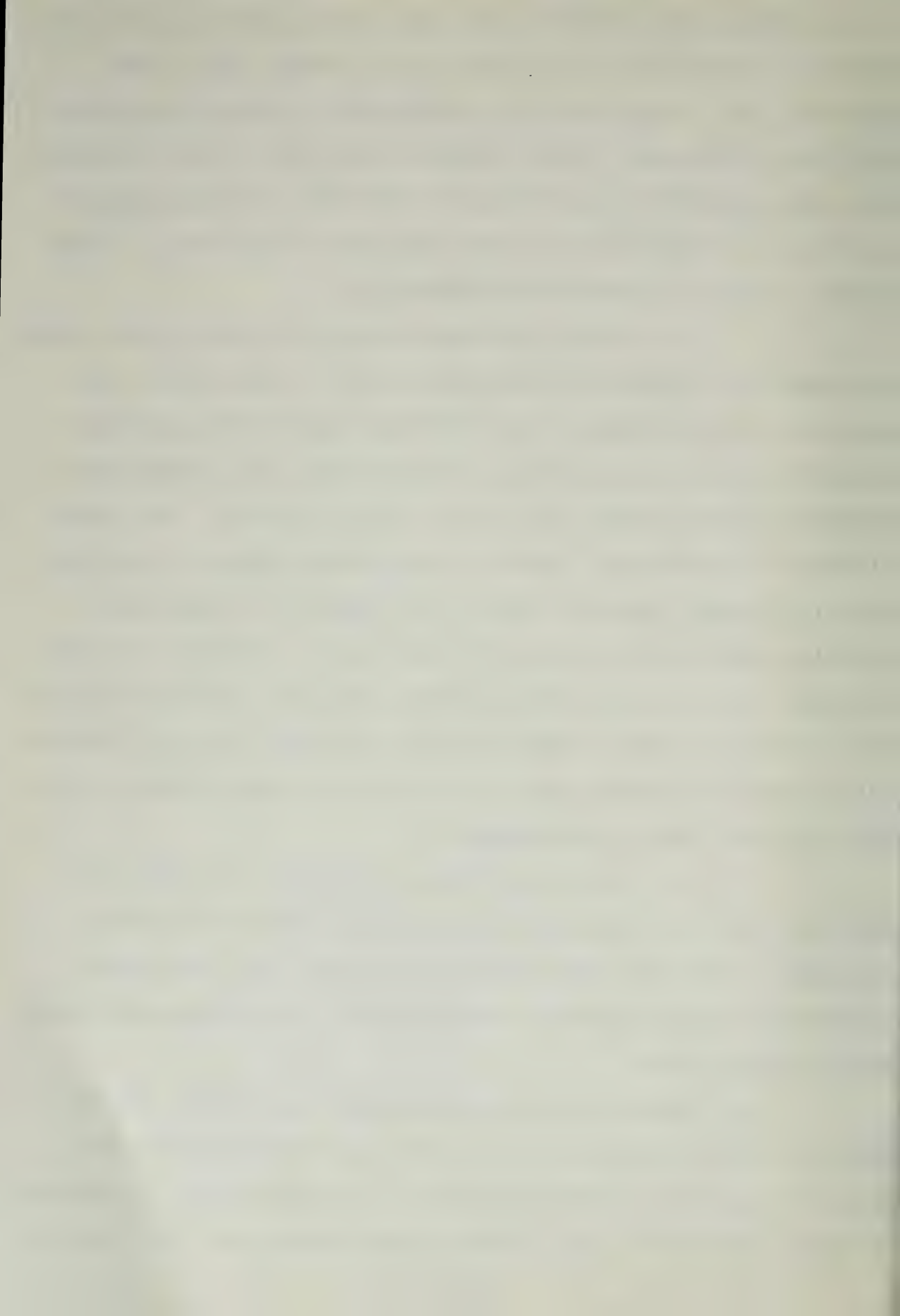
a. Ex. No. 431 is a memorandum from Mr. Sayre (officer of Norge Sales) to Messrs. Bull, Quale, and Fisher of Borg-Warner (Norge Division) dated July 15, 1960, reporting on a recently held meeting of the National Electrical Manufacturers' Association (N.E.M.A.) attended by Sayre, where factory representatives discussed "executive management responsibility in marketing practices". It reports that the leading electrical appliance manufacturers were concerned about trying to "out-bid" each other for business, and listed other causes for the then-depressed state of the electrical appliance market. Mentioned as a primary cause was the manufacturers' approach to "large volume retailers"; the correction was noted to be the establishment and maintenance of distributor prices and dealer prices to be used with all retailers, regardless of type and sales volume, with each manufacturer agreeing not to permit variances from such established retail and distributor prices. It was to be

agreed between the manufacturers that all co-operative and supplemental advertising funds were not to exceed "50% of the national rate", and promotional funds not to exceed 1% of maximum dealer billings. It was further noted that it was incumbent upon each manufacturer to bring its individual pricing program in line with competition to make the program effective. A copy of Ex. No. 431 is attached as Appendix B.

b. Ex. No. 3006 are minutes of the N.E.M.A. Board of Directors (Consumer Products Division) for January 6, 1960, reporting the development of a "code of advertising practices" adopted earlier the same day by the American Home Laundry Manufacturers' Association (A.H.L.M.A.) at its meeting. The Board planned to co-ordinate, between manufacturer members, publicity for all consumer products sold by all members in regulating retailer advertising pursuant to the "code". Members were also directed to accelerate their reporting of full sales statistical data from all trading areas to N.E.M.A. so that N.E.M.A. statistical summaries showing each manufacturer's share of each market could be more rapidly disseminated.

c. Ex. No. 3007 is an N.E.M.A. memorandum of July 18, 1960, to the Board of Directors, Consumer Products Division, noting that the members had agreed that they would standardize their capacity classifications for refrigerators and similar appliances.

3. Evidence showing the purpose and intent of Borg-Warner to restrain interstate commerce in the manufacture and sale of major home laundry appliances, in agreeing to an exchange of price information with, among others, appellees G.E., Maytag,



and Frigidaire, and the establishment of a fixed distribution system, was excluded. This evidence is contained in Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3029, 3030, 3032, 3036, and 3037. Objections that such evidence was hearsay, irrelevant, and without foundation were sustained (Tr. 6477; see objections at 6471, 6475; generally, at 6471-6477).

a. Ex. No. 3022 shows that A.H.L.M.A. members (including the appellees named above) discussed the desirability of jointly controlling production in order to control market conditions; that Borg-Warner wished to establish good and close relations with fellow members like G.E., Maytag, Frigidaire, and Westinghouse; that all members wanted to facilitate the exchange of their "published prices" and appliance specifications, to keep the status of such information available to all members "up to date".

b. Ex. No. 3024 is an A.H.L.M.A. report of factory sales of certain major appliances during 1959, showing average prices and number of units sold.

c. Ex. No. 3026 is a letter of October, 1959 from A.H.L.M.A. to Mr. Bull of Norge Sales, commenting on the Association's "voluntary code covering advertising prices", and its decision not to seek Federal Trade Commission review or approval of the program.

d. Ex. Nos. 3028 and 3029 are A.H.L.M.A. documents showing the exchange of individual marketing information, data about relative shares of markets, and prices and specifications of laundry appliances, between members (including certain of the appellees).

e. Ex. No. 3032 is an A.H.L.M.A. directive that all manufacturer members provide each other with their individual product "specification sheets" (as Whirlpool had done).

4. The Court excluded Pl. Ex. for Id. Nos. 1922, 1923, and 3095, distributor price lists of co-conspirator Lancaster (Norge distributor for Northern California), found in the files of Borg-Warner, and of retailer Hale. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1922	no foundation (Tr. 3019-3030 no foundation (Tr. 6540-6547)	Tr. 3030 Tr. 6547
1923	no foundation (Court's own motion) no foundation (Tr. 2865-2866; • see 2829-2833 for similar lists)	Tr. 887-890 Tr. 2866
3095	no foundation (Tr. 3019-3020)	Tr. 3020

See, also, appellants' offer of proof concerning Ex. Nos. 1922 and 1923 (Tr. 6540-6547).

a. Ex. Nos. 1922 (A-CY) and 3095 are Lancaster's distributor price sheets (for the periods (1957-1962, and 1959, respectively), in the possession of appellee. Ex. No. 3095 includes prices specified as "promotional list prices". Ex. No. 1923 consists of similar price sheets found in the possession of co-conspirator Hale, containing "suggested list prices".

5. The Court excluded Pl. Ex. for Id. No. 4028, showing the purpose of senior representatives of Borg-Warner and Norge Sales in meeting with representatives of co-conspirators Lancaster and Graybar (Norge distributors in California) to discuss certain shipments of Norge appliances to Manfree, during the period when the boycott was otherwise in effect. An objection of

lack of foundation for this Exhibit was sustained (Tr. 2973-2976).

a. Ex. No. 4028 is a handwritten memorandum from the files of Borg-Warner. It states that it is "very important" to get an opinion from appellee's attorneys concerning the situation where Mr. Bert Green, of Green's Department Store, Los Angeles (acting as appellants' agent - see Tr. 5500-5504), had been able to transship Norge appliances to Manfree, through co-conspirator Graybar's office in Los Angeles. It also notes that telegrams were to be sent to Mr. Freeman (Lancaster) and Mr. Bonnet (Graybar, Los Angeles), telling them it was very important that they discuss the transshipments with Mr. Bull, at the prospective meeting at the Villa Hotel, San Mateo, California.

6. The Court granted a motion to strike the testimony of Mr. Bert Green (identified above), concerning statements made to him by a representative of co-conspirator Graybar, on the ground that there was no showing of authority on the part of the declarant to bind his company, nor a prima facie showing of conspiracy so as to apply the evidence against the appellees, and that such evidence was irrelevant and hearsay (Tr. 5515-5519).

a. Green testified that after the transshipment incident previously referred to, he saw Mr. Bonnet of Graybar at a "new line" showing at Graybar, Los Angeles, in 1960. He offered Bonnet another order for Norge appliances to be shipped to Manfree. Bonnet rejected the order, saying to Green "if you give me trouble I'll take you off the list too" (Tr. 5517). See Tr. 5515-5519.

7. The Court failed to apply Mr. Green's testimony

concerning the reasons given him by managing agents of co-conspirator Graybar why they would not sell Norge appliances to Manfree, against Borg-Warner and Norge Sales.

Objections to the testimony were that it was hearsay and irrelevant (Tr. 5469-5479); during appellants' offer of proof upon the testimony, an additional objection was made that there was no showing of authority on the part of the declarant to bind his principal (Tr. 5480-5493). At the close of the testimony, when it was offered against Borg-Warner, the Court ruled as follows:

"THE COURT: . . . There's some serious doubt as to the admissibility of the - - and I'm not going to make a ruling now, as to this conversation which presumably came from somebody from Lancaster, because its hearsay upon hearsay.

Now, I have liberalized the hearsay rules here in these proceedings.

What I did admit is clearly hearsay, and the question that then arises in my mind is whether the hearsay upon hearsay is also admissible, and I'm going to reserve ruling on this. I'm not making a ruling at this time." (Tr. 5515).

In its Memorandum Opinion, the Court would not apply this testimony against Borg-Warner or Norge Sales (R. 1912, 1963-1964). See, also, appellants' offer of proof at Tr. 5479-5488.

a. Mr. Green testified that at a meeting with Messrs. Bonnet and Ash of Graybar, Los Angeles, at the latter's office, he asked Bonnet to order a carload of Norge appliances for shipment to Manfree. Bonnet replied that he could not do it because "Lancaster wouldn't allow me" (Tr. 5508). At Green's request, Bonnet telephoned Lancaster in San Francisco to ask why Graybar couldn't transship to Manfree; Bonnet told Green that he

was told during this call that it didn't matter if Graybar sold to Manfree, but that Lancaster would not because". . . I don't want to jeopardize a million dollar business with Broadway-Hale" (Tr. 5509).

8. The Court excluded evidence that these appellees granted direct preferential and discriminatory arrangements to co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 643, 645, 3085, 3086, 4092, and 4098. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
643, 645	no foundation (Court's own motion)	Tr. 2869
3085	irrelevant (Tr. 529-530)	Tr. 530
3086	irrelevant, no foundation (Tr. 527-529)	Tr. 529
4092	irrelevant (Tr. 2698-2700)	Tr. 2700
4098	irrelevant (Tr. 2737-2738)	Tr. 2738

It was stipulated that Ex. Nos. 643 and 645 were authentic (Tr. 2869).

a. Ex. No. 643 (A-B) shows recognition by Norge Sales that "key accounts" (like Macy's and Hale) required special "advertising support" from the factory; and shows that co-conspirator Macy's was receiving such support.

b. Ex. No. 645 shows that Hale and Macy's were two of the three San Francisco Norge dealers getting special "key account" advertising funds; \$22,323.04 had been provided by the factory for a 6-month period in 1957.

c. Ex. No. 3085 is the calling card of Mr. Sanford, then Hale's appliance sales manager, obtained from Borg-Warner's files.

d. Ex. No. 3086 is an invitation to Sanford of Hale from Sayre of Borg-Warner, inviting Sanford to meet with Borg-Warner's senior management personnel.

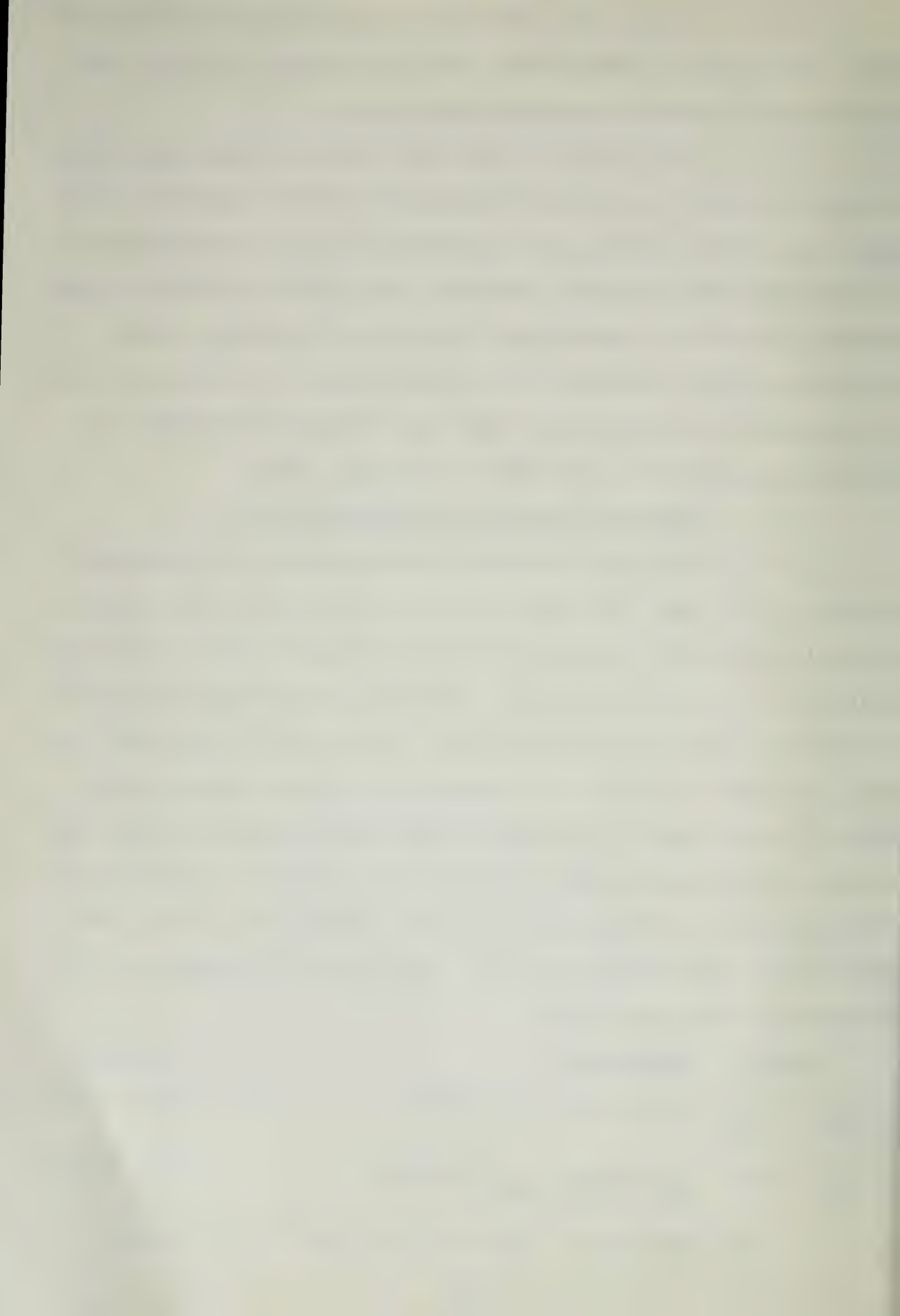
e. Ex. Nos. 4092 and 4098 (X,Y) show that Borg-Warner maintained a program of special cocktail parties at its national "trade shows", to be attended only by representatives of selected "key account" retailers and senior Borg-Warner management personnel, recognizing the need to cultivate these dealers; and the selection of representatives of Hale and Macy's by co-conspirator Lancaster (the local Norge distributor) to attend such parties to be held in January, 1958.

C. Evidence Pertaining To Appellee G.E.:

• 1. The Court excluded the admissions of representatives of G.E. that its dealers did not engage in retail price competition in San Francisco; that it investigated to find out which brands of appliances and television sets were being sold by discount stores in San Francisco, San Jose, and Oakland; and that it agreed to sell its products to a large discount store chain ("White Front") in Oakland only after co-conspirator Hale ceased selling appliances and television sets in San Francisco. This evidence is contained in Pl. Ex. for Id. Nos. 5032, 5033, 5034, 5044, 5045, 5046 and 5047. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
5032, 5033, 5034, 5044	irrelevant (Tr. 5258)	Tr. 5258
5045, 5046 5047	irrelevant, no foundation (Tr. 5264-5266)	Tr. 5266

See appellants' offer of proof at Tr. 5251-5258.

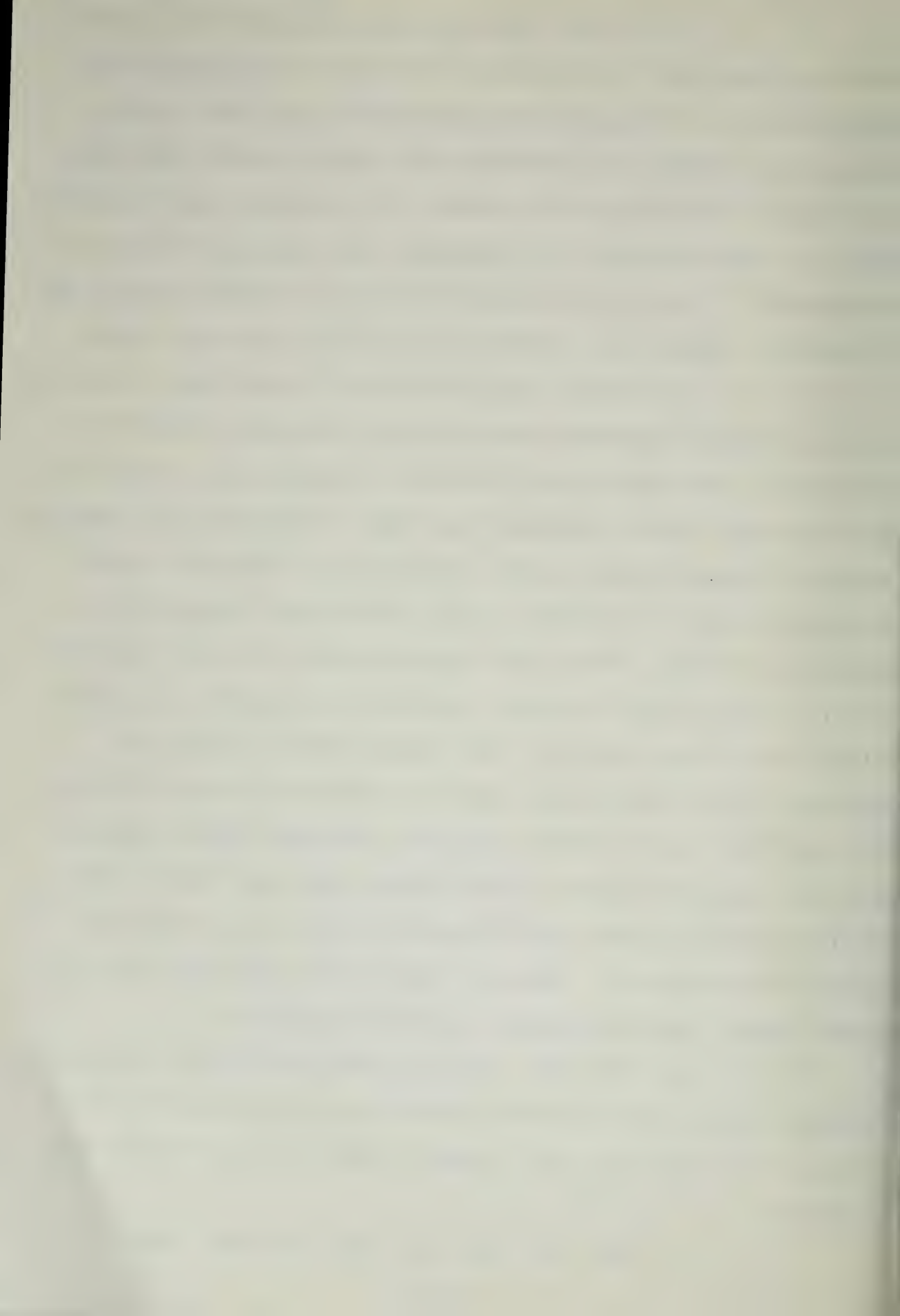


a. Ex. No. 5032, an intra-company study, indicates G.E. was very worried about the effect its franchising a discount store ("White Front") would have upon other, established G.E. dealers, and whether such actions would cause loss of "support" from the other dealers. It observes that Frigidaire and G.E. were refusing to do business with so-called "mass merchandisers". There is a specific reference to losing Macy's as a retailer, should G.E. decide to franchise a discount house.

b. Ex. No. 5033 indicates, on its face, that G.E. sales personnel expressed concern that franchising White Front could well cause their other dealers to abandon price stability, and encourage "price warfare"; and their recognition that dealers would not calmly accept G.E.'s franchising a discount store. Concern was also stated that such a move would disrupt G.E.'s dealers structure, would hurt sales (because of dealer resistance) as well as its "N.E.M.A. position" (of sales.) It recognizes that in the past G.E. had intentionally excluded the discount stores, and states that Frigidaire had done likewise. It notes that G.E.'s dealers did not advertise retail prices, and had followed suggested list prices, and that their large dealers would cut back on purchases of G.E. should discount stores be franchised. Finally, there is an evaluation that discount stores "unquestionably" would be successful.

c. Ex. Nos. 5034 and 5044 are similar documents, showing further intra-company fears that by franchising White Front, G.E. would lose its "present team" of retail dealers in reaction.

d. Ex. No. 5044 is a G.E. business record



indicating that White Front was opening a store in South San Francisco, and that appellee was ready to franchise it.

e. Ex. Nos. 5045-5047 show that G.E. was concerned about the various brands of television and major appliances being carried by the discount stores in the Bay Area, (including appellants) and contain the listing of the various brands found at these stores.

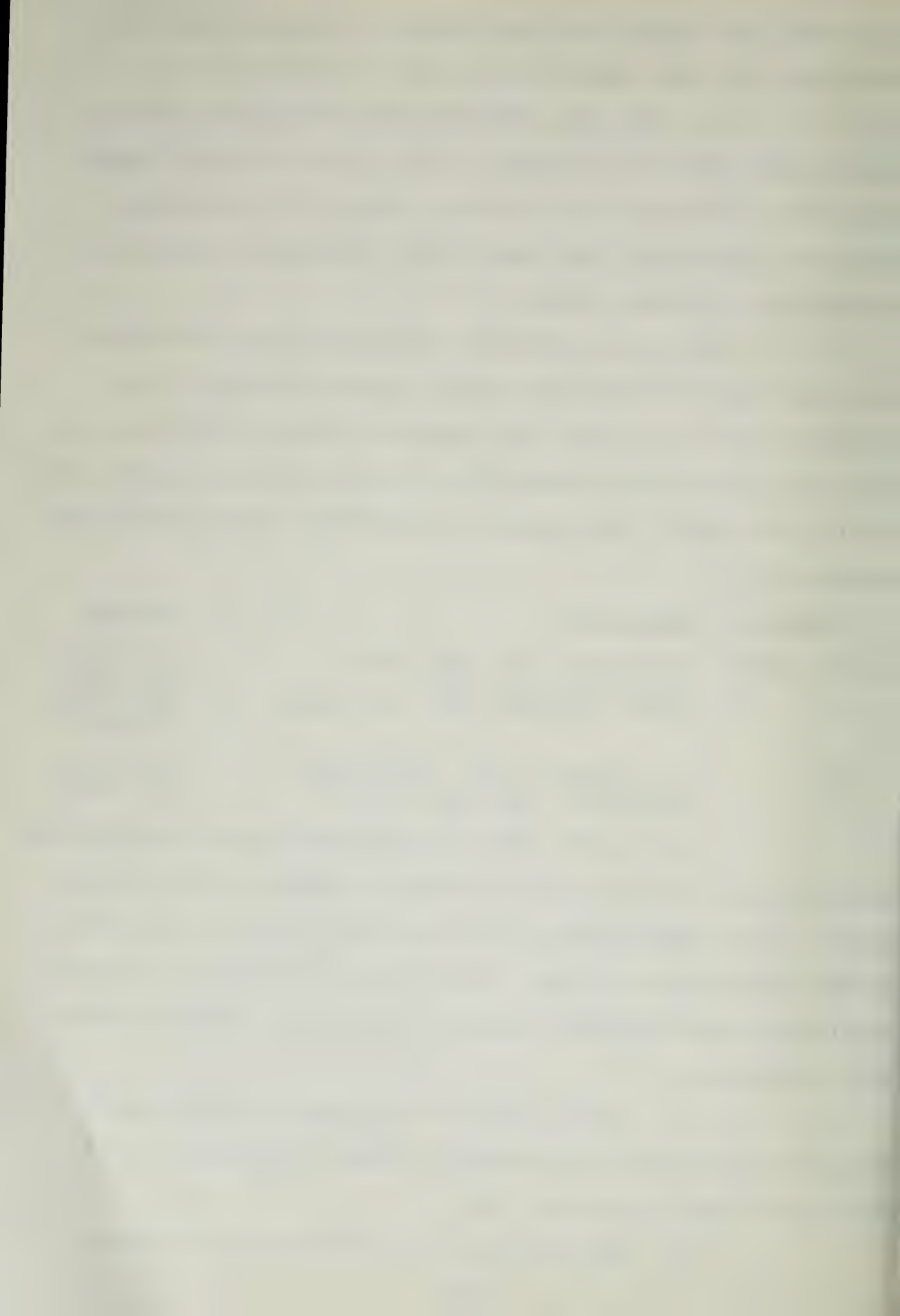
2. The Court excluded evidence of sales of Hotpoint brand appliances to discount stores located outside of San Francisco (Pl. Ex. for Id. Nos. 4196 and 5052); and evidence of direct dealings between Hotpoint and co-conspirator Hale (Pl. Ex. for Id. No. 4391). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4196, 5052	irrelevant (Tr. 5456-5457)	Tr. 5457
	irrelevant (Tr. 6513)	Tr. 6513
	(offer of proof, Tr. 5456-5457)	Tr. 5457 (denied)
4391	no foundation (Tr. 3238-3246)	Tr. 3246
	irrelevant (Tr. 6509-6513)	Tr. 6513

a. Ex. No. 4196 is a Hotpoint record showing that appellee was selling Hotpoint products to White Front discount store in Los Angeles during 1957 and 1958, to White Front stores in the Oakland area in 1963, and to "G.E.M." discount stores in San Leandro and San Jose, while it continued to refuse to deal with appellants.

b. Ex. No. 5052 is a document showing that Hotpoint franchised White Front in Oakland in November, 1963, and in San Jose in January, 1964.

c. Ex. No. 4391 is a Hotpoint "dealer contact



report", stating that a Hotpoint representative had inspected Hale's store and reported that its business was "going great"; expressing a hope that Hale could soon be franchised as a Hotpoint dealer in San Francisco; and noting the desirability of getting the Hale account.

3. The Court excluded evidence that the consent of Hotpoint was considered necessary by Mr. Vern Brown, district appliance manager for co-conspirator Graybar (local Hotpoint distributor) before Graybar ceased selling Hotpoint appliances to discount stores in San Francisco, by excluding Pl. Ex. for Id. Nos. 5112 and 5113.

These exhibits were offered in connection with the testimony of Mr. Brown, at Tr. 6084-6086. The offer was rejected by the Court, based on its rulings that the exhibits, and the witness, had not been listed by appellants in their pre-trial pleadings. (See Court's ruling and argument thereon, at Tr. 6065-6070).

a. Pl. Ex. for Id. Nos. 5112 and 5113 consist of 1958 correspondence between Mr. Brown and an officer of Graybar, and which the latter states to Brown that the new sales policy of Graybar is not to renew the franchises of "those White Front" discount stores, because Graybar wanted other, more established dealers to "listen to our story". It also directed the cancellation of franchises of any dealers who transshipped goods. In his reply, Mr. Brown indicated that it would not be appropriate to cancel franchises at the moment, but such should be done over a gradual period of time. He noted that cancelling a discount house (in Oakland) would mean a loss of substantial

income to Graybar, as well as a loss of position in the trading area by Hotpoint. He clearly stated that to cancel such franchises in San Francisco, Graybar would have to get Hotpoint's permission and would thereafter require much in the way of "money support".

4. The Court excluded appellants' offer of the testimony of Mr. Brown that Graybar was required to cease selling Hotpoint appliances to discount stores in San Francisco, in order to be able to sell to the large department and appliance stores.

The Court's ruling upon the permissible scope of Mr. Brown's testimony appears at Tr. 6065-6070. Appellants offer of proof appears at Tr. 6099-6106. The Court excluded this evidence on the grounds that Mr. Brown had not been properly listed as a prospective witness in appellants' pre-trial pleadings. (See Tr. 6103-6106).

a. Appellants offered to prove, through the testimony of Mr. Brown, that he was demoted and replaced by Mr. Mayben, who then changed Mr. Brown's policy of selling Hotpoint appliances to discount stores. Mr. Brown's testimony would also be that when Hotpoint was sold to discount stores, Hotpoint would not provide such dealers with follow-up services and assistance (contrasted to other dealers); that Hale representatives would not discuss buying Hotpoint while Graybar was selling to the "G.E.T." discount store in San Francisco, and that after the discount stores were cancelled as Hotpoint dealers, Graybar's annual sales volume dropped from \$12 million to \$8 million. (See Tr. 6103-6108).

5. The Court excluded appellants' offer of the testimony of Mr. Bernard Freeman about the statements of a G.E. salesman to him when he requested the G.E. major product lines.

The offered testimony was objected to on the grounds that there was no showing of salesman's authority to bind his company (Tr. 5867-5868), which was sustained. (Tr. 5869).

a. The testimony of Mr. Freeman concerning his conversation with Mr. White of G.E. was that when the latter called at U.S.E., he told Mr. Freeman that Manfree was not going to be able to obtain the G.E. appliance line in 1957, because the San Francisco "dealer structure" prevented such sales being made. (Tr. 5868-5869).

6. The Court excluded evidence that G.E. had direct preferential and discriminatory arrangements with co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 1184, and 5090-5100. Counsel for G.E. stipulated that Ex. Nos. 5090-5100 were authentic (Tr. 5362). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1184	no foundation (Tr. 6520)	Tr. 6520
5090-5100	irrelevant (Tr. 5357-5361, 5363).	Tr. 5363

See, also, appellants' offer of proof as to Ex. Nos. 5090-5100 at Tr. 5360-5362.

a. Ex. No. 1184 shows that G.E. allowed Hale 100% paid advertising credit for newspaper ads in San Francisco in June, 1959, under a "special advertising fund".

b. Ex. Nos. 5090-5100 are G.E. co-operative

advertising authorizations (dated 1959) giving that retailer 100% compensation for its newspaper advertising during this period. Ex. No. 5090 indicates that a "special flat rate" was provided for the month of February, 1959.

7. Evidence that Hotpoint maintained suggested prices for Hotpoint products after 1958 (Pl. Ex. for Id. No. 5050) was excluded. This evidence was offered in connection with the reading of the deposition of Mr. Wichman, a senior officer of appellee Hotpoint. Admissibility of the evidence was objected to on the grounds of lack of foundation, which was sustained. (Tr. 5453-5454).

a. Ex. No. 5050 is a schedule, prepared by Hotpoint applicable to Northern California, Salt Lake, and Boise, tabulating as to certain models the suggested retail prices (for the San Francisco area) and dealer prices actually charged, which are identical.

D. Evidence Pertaining To Appellee R.C.A.:

1. In rejecting Pl. Ex. for Id. Nos. 343 and 344, the Court excluded clear evidence that R.C.A. established and maintained a retail price program by which retailers selling its products were required to maintain price uniformity in San Francisco County; and that the distributor of R.C.A. products, in fact, followed retail price statements promulgated by appellee. The grounds of objection and transcript references are:

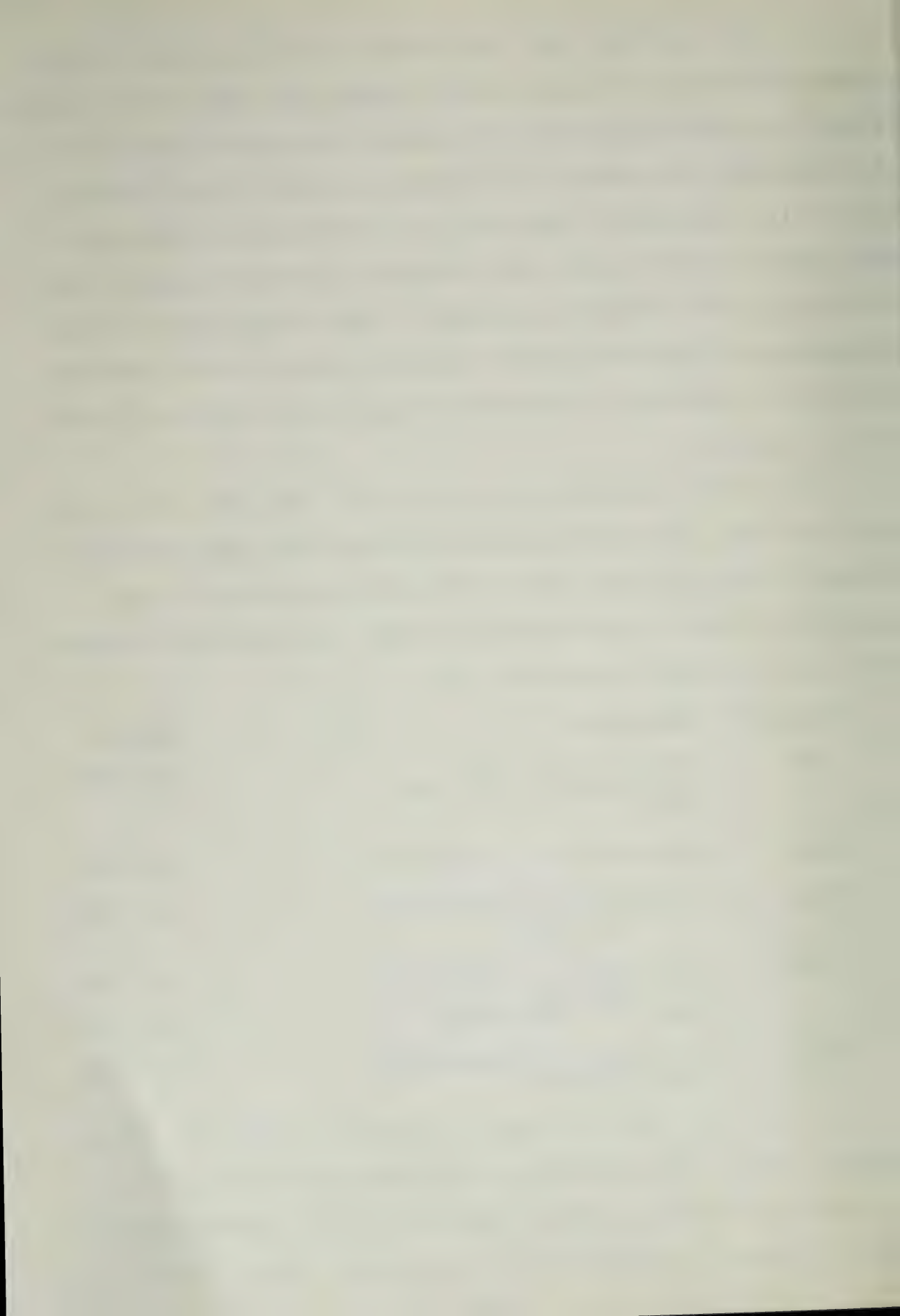
<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
343, 344	irrelevant, no foundation (Tr. 4549-4552)	Tr. 4552
	same (Tr. 4717-4719)	Tr. 4719
	appellants' offer of proof; same objections (Tr. 6497-6508).	Tr. 6839 (offer denied)

a. Ex. Nos. 343 and 344 consist of R.C.A. intra-company memoranda in August, 1957, between Mr. Maag and Mr. Saxon, senior officers of appellee, concerning the request of R.C.A.'s San Francisco distributor, co-conspirator Meyer, that the suggested list prices on certain R.C.A. merchandise be raised by the factory (with a price list attached, containing pencil notations as to the changes in suggested list prices); and a similar memorandum in September, 1958, from Mr. Wallace to Mr. Peterson, both R.C.A. officials, attaching a Meyer price sheet on "promotional models".

2. In excluding Pl. Ex. for Id. Nos. 348, 5060, 5061, 5068 and 5070, the Court excluded evidence that appellee R.C.A. directly controlled the advertising and promotion of R.C.A. television sets in San Francisco County. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
348	hearsay, irrelevant, no foundation (Tr. 4603-4604)	Tr. 4604
5060	irrelevant (Tr. 4553-4554)	Tr. 4554
5061	irrelevant, no foundation (Tr. 4783-4785)	Tr. 4785
5068	irrelevant, no foundation (Tr. 4809-4810 same (Tr. 6495-6496)	Tr. 4810 Tr. 6496
5070	irrelevant, no foundation (Tr. 4812-4813)	Tr. 4813

a. Ex. No. 348 is a letter of September, 1958, from Mr. Henry, Vice-President of co-conspirator Meyer, to Mr. Wallace of R.C.A., making objections to the factory about R.C.A.'s national advertising of televisions, seen in the



San Francisco area, at lower prices than the R.C.A.'s suggested retail price for San Francisco.

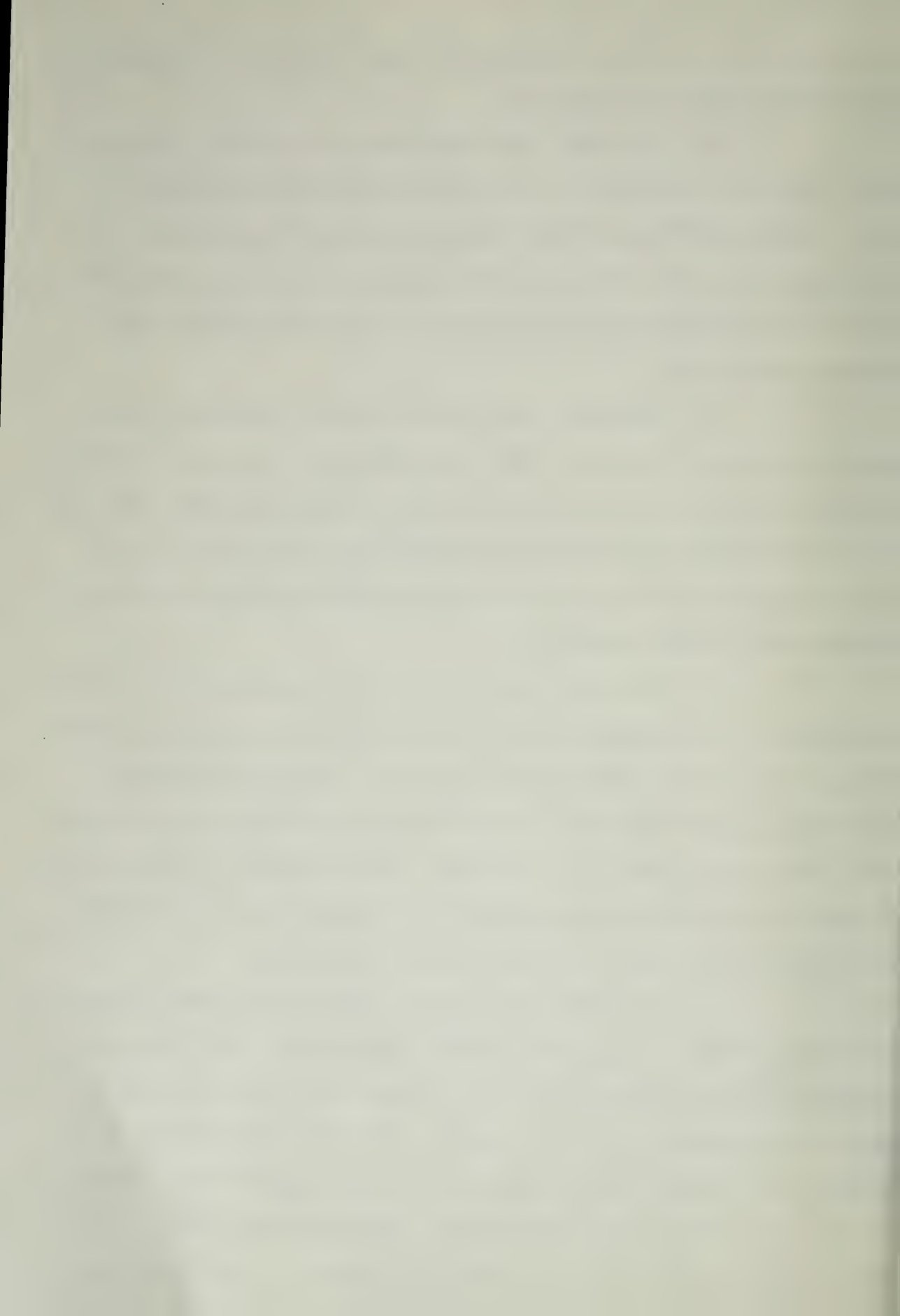
b. Ex. No. 5060 consists of a written instruction from R.C.A. to all of its distributors dated February 2, 1959, requiring them to base their advertising allowances to retailers upon list prices; and discontinuing the requirement that the distributors had to match the factory's funds for dealer advertising.

c. Ex. No. 5061 is a letter from R.C.A. to co-conspirator Meyer in June, 1963, setting out a program for R.C.A. factory-paid advertising for all local area newspapers, listing the local dealers who would benefit by such advertising; and instructing the distributor to set the pricing that would be shown on the advertisements.

d. Ex. No. 5068 is an R.C.A. memorandum to its distributors of December, 1962, with instructions how to control "comparative price advertising" by R.C.A. dealers by denying advertising fund credits to such dealers; and requiring affidavits under oath from R.C.A. dealers participating in distributor or manufacturer advertising funds, verifying what prices they were showing on their R.C.A. product advertising.

e. Ex. No. 5070 is an instruction from R.C.A. to its distributors of December, 1962, showing the full control exercised by the factory over the payment by distributors of advertising money to R.C.A. dealers, in that the factory required that it give prior approval of such payments to dealers.

3. The Court refused to admit evidence that R.C.A. had directly refused to sell its television sets to appellant



Manfree, in excluding Pl. Ex. for Id. Nos. 1691 and 1702. The grounds of objection and the transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1691	no foundation (Tr. 6114-6117)	Tr. 6117
1702	irrelevant (Tr. 5969-5970)	Tr. 5970

a. Ex. No. 1691 is a letter dated July 13, 1960, from Mr. Alpine, President of appellants, to the National Sales Manager of R.C.A., requesting the right to buy R.C.A. products.

b. Ex. No. 1702 is a letter dated December 16, 1963, from R.C.A.-Victor Distributing Corporation, of Los Angeles to Manfree, stating that the former would not sell R.C.A. appliances to appellant.

4. The Court excluded the deposition testimony of Mr. A. H. Meyer, former officer of co-conspirator Meyer, showing that R.C.A. distributed television sets directly to retailers in Southern California; that Meyer and R.C.A.-Victor Distributing Corporation of Los Angeles agreed to a territorial division for R.C.A. product distribution in California; and that the latter refused to sell television sets to Manfree in respecting this exclusive territorial arrangement.

The testimony of Mr. Meyer set out in his deposition appears at deposition Tr. 10:15-22 and 15-17. The Court refused to permit the deposition testimony to be read into evidence. (Tr. 4415; 4489-4490).

a. In his deposition testimony, Mr. Meyer said that R.C.A. products were distributed in the Los Angeles area by "R.C.A.-Victor Distributing Company which is a wholly owned

subsidiary of the Radio Corporation." This subsidiary had the exclusive distribution rights in the counties south of the Tehachapis; or, Southern California (Deposition, Tr. 10). Mr. Meyer also admitted that R.C.A.-Victor Distributing Corporation sells R.C.A. products directly to dealers in the Southern California area; and that when they attempted to sell their products in Northern California, his company had made objections. He admitted that he had had discussions with R.C.A. officials concerning this problem of "transshipments" (Deposition, Tr. 15-17).

5. In excluding Pl. Ex. for Id. Nos. 780 and 1159, the Court excluded evidence clearly showing that R.C.A. recognized co-conspirator Hale as a "key account" in the San Francisco area; and in excluding Pl. Ex. for Id. Nos. 1165-1169, the Court excluded evidence of Hale's special treatment by R.C.A. with respect to special advertising funds. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
780, 1159	hearsay, irrelevant, no foundation (Tr. 4648-4650)	Tr. 4650
1165-1169	same (Tr. 4952-4954)	Tr. 4954

a. Ex. Nos. 780 and 1159 are interrelated; No. 780 is a letter from a representative of Meyer to an officer of R.C.A., stating that retailers Hale and Macy's in San Francisco were "key accounts" for R.C.A. products, and noting that the distributor (Meyer) was requesting the factory to forgive these stores for submitting certain advertising claims in possible violation of F.T.C. Regulations. Ex. No. 1159 is the response

of R.C.A. to that request, stating that R.C.A. would forgive the mistakes of these two retailers, and honor their advertising claims.

b. Ex. Nos. 1165-1169 indicate that requests for special promotional allowances for co-conspirator Hale were forwarded to R.C.A. by the distributor and honored by R.C.A., concerning certain in-store promotional expenditures by Hale, stating that the allowance should be made after an "agreement" had been reached between representatives of Hale and Meyer.

6. The Court excluded deposition testimony of Mr. Meyer to the effect that co-conspirator Meyer had strongly protested to R.C.A. concerning sales of R.C.A. televisions to a "Spiegel Outlet" store, because that store was advertising such products in San Francisco newspapers, at prices below R.C.A.'s list prices, and noting that because of such ads, Meyer had been subjected to pressures and protests from R.C.A. dealers.

Mr. Meyer's testimony appears at deposition Tr. 20-23, 24-25, 26:14-15, 27-30, 31:2-17, 32:4-20, 32:21-33:17, 33:18-23. The Court refused to admit this testimony on the ground of lack of relevancy (Tr. 4415-4418, 4499). The correspondence was offered as Pl. Ex. for Id. Nos. 783 and 784 (being Ex. Nos. 1 and 2 in the Meyer deposition), which were rejected on the Court's own motion as being irrelevant (Tr. 4416-4418).

a. Ex. No. 783 is a letter dated July 22, 1957 from a representative of Spiegel, stating that it is Spiegel's information that R.C.A. was not fair traded; the letter obviously reflects a response to some protest to Spiegel that it cease selling R.C.A. products below suggested list prices.

Ex. No. 784 is a letter dated July 19, 1958 to Mr. Maag (Vice-President and Western Sales Manager for R.C.A.) from Mr. Henry of Meyer, forwarding a copy of the Spiegel "price-cutting" advertisement on R.C.A. products which had run in the San Francisco Call-Bulletin newspaper, and registering the protest of the distributor at this practice.

b. In the deposition testimony of Mr. Meyer upon the Spiegel situation, he identified the recipient of Ex. No. 783 as a former attorney for Meyer; stated that he had ascertained that Spiegel obtained R.C.A. merchandise from Chicago (somebody, either from Meyer or R.C.A. obtained this information from Spiegel); that he recalled that his Sales Manager, Mr. Henry, discussed the Spiegel matter with sales representatives of R.C.A.; that in the normal course of business, he would have instructed Mr. Henry to bring the Spiegel advertising matter to the attention of R.C.A.; and that he had requested his attorney to write Spiegel a letter with respect to their advertising.

7. The Court excluded the deposition testimony of Mr. Maag, former Vice-President of R.C.A., to the effect that R.C.A. received protests concerning the "Spiegel Outlet" situation referred to above, from its distributor.

The deposition testimony of Mr. Maag appears at deposition Tr. 89-91, 92, and 93-95. Objections were made to this testimony as being hearsay, irrelevant, and not the best evidence, which objections were sustained (Tr. 4622-4625; see 4626-4628, and 4715-4719).

a. In his deposition, Mr. Maag stated that he recalled the "Spiegel Outlet" store incident and receiving the



letter from Meyer; and that he recalled that the retail stores in San Francisco were upset concerning the Spiegel advertisement in the San Francisco newspaper listing prices below the suggested list prices. He recalled that some of the retailers had returned R.C.A. products after the incident.

8. The Court excluded a statement by Mr. Saxon, a Vice-President of appellee, made in his deposition, to the effect that his company did not engage in price competition in the sale of television sets. The statement is contained at deposition Tr. 131:2-21. The Court's ruling is at Tr. 4522-4524.

9. In excluding Pl. Ex. for Id. Nos. 363, 364 and 365, the Court excluded evidence that R.C.A. had direct knowledge of the purposes, actions, and names of members of the San Francisco "Better Business Bureau"; and of the position of authority in that organization of Mr. Lachman, officer of co-conspirator Lachman Bros. These exhibits were used in the deposition of Mr. Meyer, and foundational testimony concerning them was read into the record at Tr. 4496-4497. When the exhibits were offered into evidence, they were objected to as being irrelevant and consisting of hearsay, which was sustained (Tr. 4747).

a. Ex. Nos. 363, 364 and 365 consist of correspondence dated August 1957, between officers of co-conspirator Meyer relative to the R.C.A. Service Division's plan to quit the San Francisco "Better Business Bureau"; correspondence from Mr. Lachman (on behalf of B.B.B.) to Mr. Meyer requesting him to do what he could to keep that company in the association; and a letter from Meyer to R.C.A. concerning the situation and stressing



the importance of Mr. Lachman in the San Francisco retail market, and suggesting that steps be taken to maintain the membership.

E. Evidence Pertaining To Appellee Whirlpool:

1. The Court excluded Pl. Ex. for Id. No. 5086, evidence that appellees R.C.A. and Whirlpool had common directors.

Ex. No. 5086 was objected to as being irrelevant, which was sustained (Tr. 5161-5162). This Exhibit is Whirlpool's answer to appellants' interrogatory, stating that Mr. Folsom and Mr. Odorizzi served as directors of both companies.

2. The Court rejected Pl. Ex. for Id. No. 1714, evidence that appellants' written request for Whirlpool products sent to appellee, was personally brought to the attention of Meyer (local Whirlpool distributor) by a letter to Meyer from Mr. S. Golden, a senior officer of Whirlpool. It was stipulated that Ex. No. 1714 was authentic (Tr. 5144); but it was objected to as lacking relevancy and foundation, which was sustained (Tr. 5146-5147).

3. The Court excluded Pl. Ex. for Id. No. 5077, containing evidence of direct and preferential treatment given co-conspirator Hale by Whirlpool, and of Whirlpool's direct involvement in the local retail market. This Exhibit was objected to as irrelevant, which was sustained (Tr. 5054-5055).

a. Ex. No. 5077 (A-D) is a report of a Meyer Whirlpool salesman, of his discussion with Mr. S. Golden of Whirlpool about Hale's need for additional factory advertising funds, in order for it to carry a "full line" of Whirlpool goods; and also about the franchising of "Bay Mart" (a discount store

in San Jose) with Whirlpool products; and his discussions of the retail price structure on freezers with various retailer representatives.

F. Evidence Pertaining To Appellees Frigidaire And Frigidaire Sales:

(Appellees admit that Frigidaire Sales is a wholly-owned subsidiary of General Motors, R. 6,51. Appellees are collectively referred to as "Frigidaire", except where otherwise noted.)

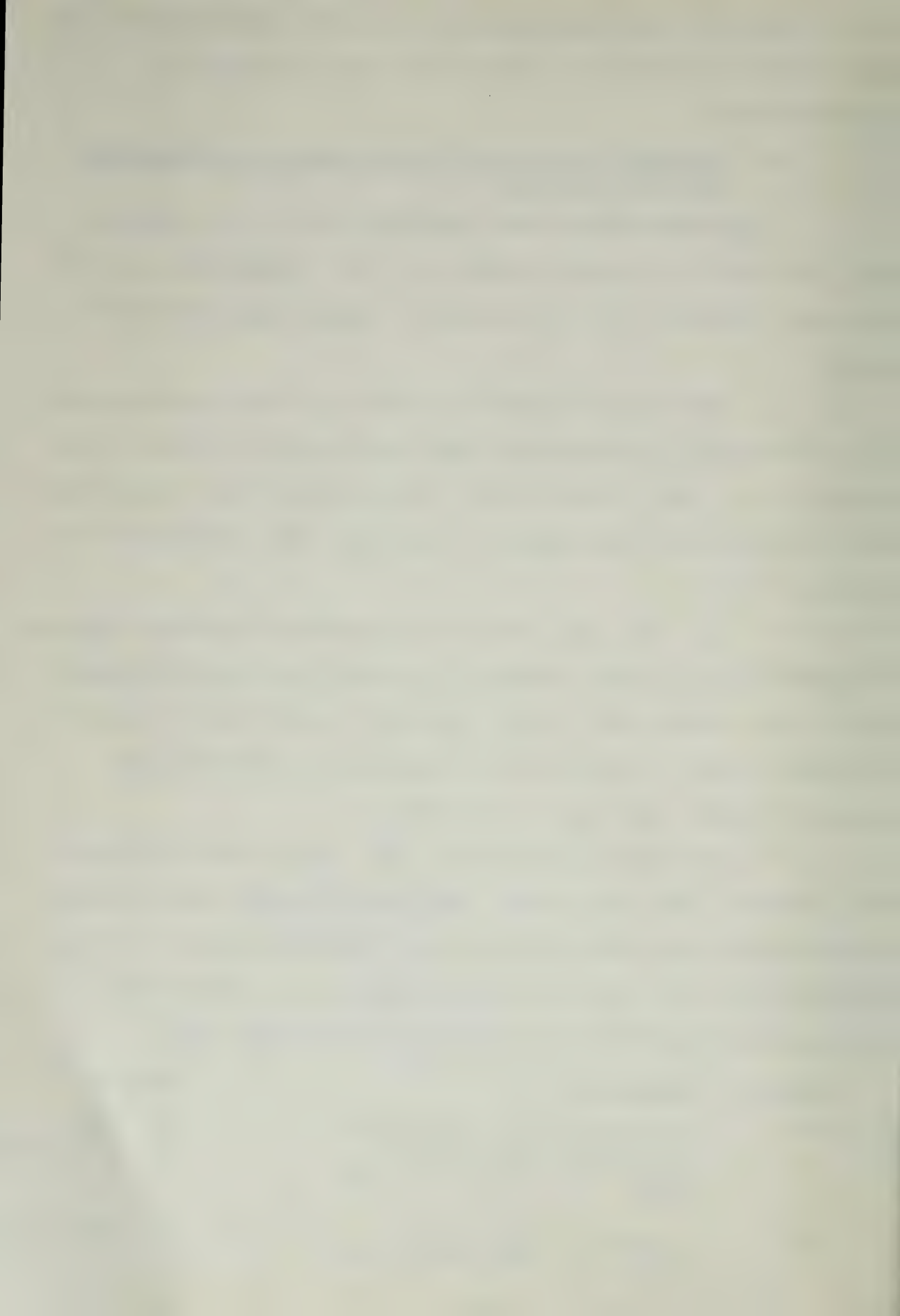
1. The Court excluded evidence of direct preferential and discriminatory arrangements with co-conspirator Hale, in excluding Pl. Ex. for Id. No. 1985. This evidence was rejected as being irrelevant at that point in the trial (Tr. 4258-4259; see 4256-4260).

a. Ex. No. 1985 are Frigidaire "Quarterly Reports" of expenditures to retail dealer advertising and special promotional funds (model year 1958), showing it paid 100% of claims submitted by Hale, Lachman Bros., Sterling and Redlick upon "special fund(s)" and "key city fund(s)".

2. The Court excluded Pl. Ex. for Id. Nos. 4170 and 4178, evidence that after 1961, Frigidaire established a policy of maintaining its retail list prices in San Francisco. (It was stipulated that Ex. No. 4170 was authentic. Tr. 1557-1558).

The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4170	irrelevant (Tr. 1558-1559) cumulative (Court's own motion; Tr. 1895-1911; 4097- 4104)	Tr. 1559 Tr. 1911, 410
4178	cumulative (Court's own motion; Tr. 1895-1911; 4097- 4104)	Tr. 1911, 410



a. Ex. Nos. 4170 and 4178 are Frigidaire price sheets from the Lachman and Redlick "price books", respectively. Ex. No. 4178 contains pencilled-in list prices indicating that the retailer obtained these from Frigidaire. Ex. No. 4170 shows the same pencilled-in list prices, as well as pencilled list prices "with trade" identical to those in Ex. No. 4178 (for an earlier period).

G. Evidence Pertaining To Appellees Maytag, And Maytag West Coast:

(It was conceded that Maytag West Coast was the wholly-owned distributing arm of Maytag, (R. 1915), thus all references here to "Maytag" or "appellee" include both, unless otherwise specified.)

1. The Court excluded Pl. Ex. for Id. No. 565, showing that Maytag directed appellants not to advertise Maytag appliances with prices listed in such advertisements. This Exhibit was objected to for lack of foundation, which objection was sustained. (Tr. 3341-3343).

a. Ex. No. 565 is a hand-written memorandum on Maytag letterhead given to Manfree by Mr. Fenn Wilson of Maytag West Coast, authorizing appellant to receive Maytag advertising credits on the condition that "no prices" would be shown on appellants' advertising of Maytag products.

2. The Court denied appellants' offer of the testimony of Mr. Bernard Freeman that he had been told by Mr. J. T. Mitchel, Regional Manager of Maytag West Coast, that his company would no longer sell products to Manfree, because it was no longer going to sell to discount stores in San Francisco due to

a change in its policies.

Appellants began introduction of this testimony at Tr. 6059; however, previously appellee had objected to any evidence relating to Maytag or Maytag West Coast prior to April 9, 1959, based on appellants' answer to Maytag Interrogatory No. 9 (appellee's interrogatory appears at R. 728, 731; appellants' answer at R. 958, 961), stating, in part:

"Answer to Interrogatory No. 9:

(a) The conspiracy to which Maytag became a member on April 30, 1959 was commenced prior to that time, and is known to plaintiffs to have existed in May 1957. Plaintiffs do not know of the existence of any formal agreement or contract evidencing the conspiracy. But it refers defendants to all agreements and contracts with the defendants in this action, including the price sheets given defendant retailers by the vendor defendants, franchise agreements with certain retail defendants, the purchase order with Hales for \$10,848.49 dated just prior to April, 1959 (in March)"

The Court then ruled as follows (Tr. 5784):

"All right, all testimony, then, with relation to acts and declarations of Maytag or its representatives prior to, was it, April 9, 1959 will be excluded."

(See Tr. 5781-5785).

Appellants' offer of the testimony concerning the Mitchel conversation was rejected by the Court, based on its ruling above, because it took place prior to April 9, 1959. (See Tr. 5785-5788; 6059-6064).

3. The Court excluded Pl. Ex. for Id. No. 4165, showing written comments by representatives of Maytag West Coast concerning Manfree's written request to appellee in 1961, for

the right to buy Maytag products.

When Ex. No. 4165 was offered, it was rejected by the Court until such time as "things are tied up" (Tr. 3354; see Tr. 3351-3354). It was offered again in connection with the testimony of Mr. Freeman, and was objected to as cumulative and without foundation, which objections were sustained. (Tr. 5791-5792).

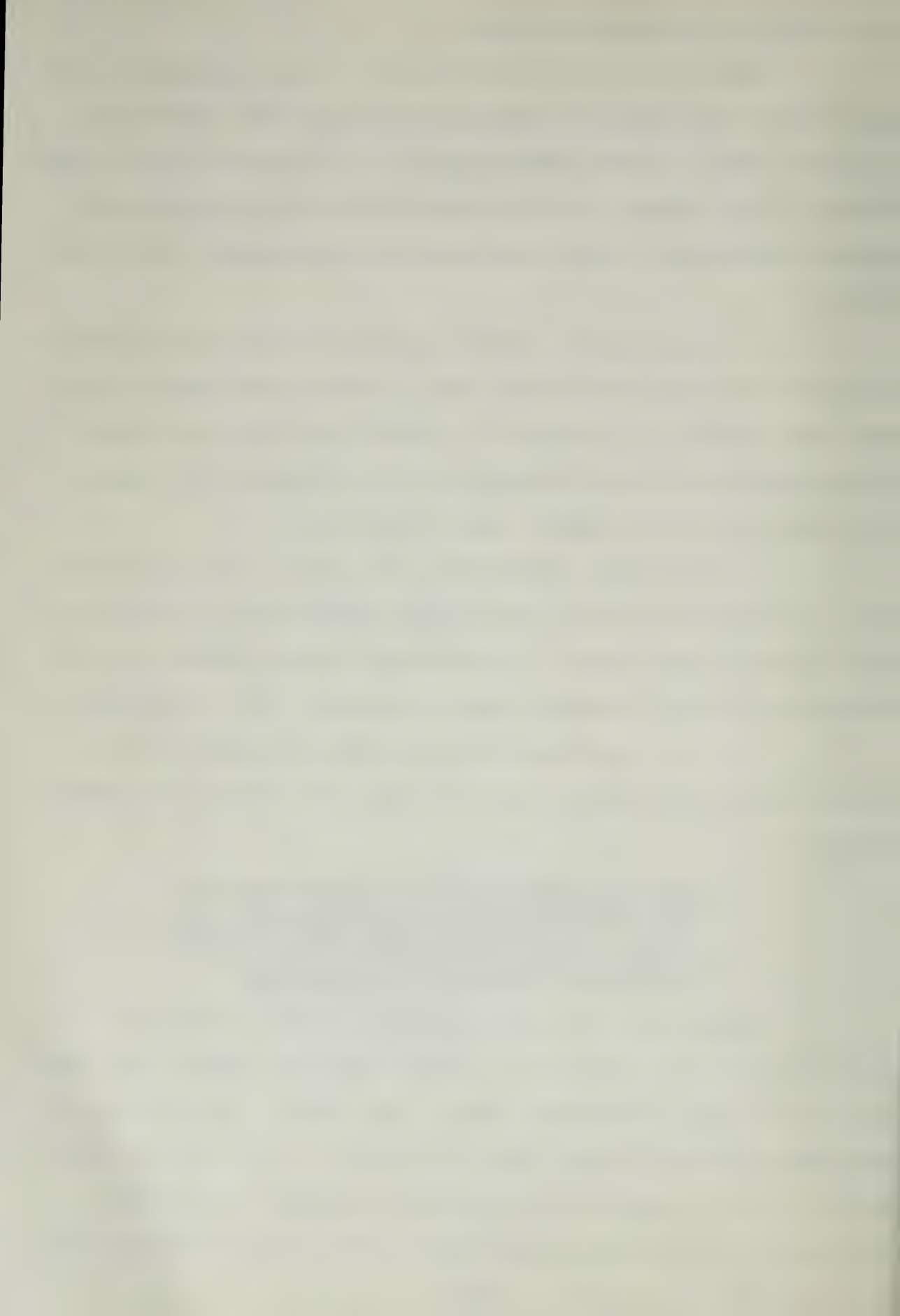
a. Ex. No. 4165 is appellant's letter requesting product from Maytag West Coast sent in 1961, received by appellee, and containing a notation in handwriting that the letter stated appellants were discontinuing the "closed-door" policy, and wondering if the lawsuit was to continue.

4. The Court excluded Pl. Ex. for Id. Nos. 1079 and 1089, containing evidence that Maytag allowed special prices to Hale on Maytag appliances. Objections to these exhibits by appellee as lacking foundation were sustained. (Tr. 1120-1122).

a. Ex. Nos. 1079 and 1089 are appellee's invoices noting that Maytag freezers were sold to Hale at "special prices".

H. Material Portions Of The Deposition Of
The Deceased Officer Of Appellants, Mr.
Alpine, Concerning Reasons For Refusals
To Deal Given Him By Appellee And Co-
Conspirator Vendors, Were Excluded

Defendants took the deposition of Mr. Alpine on March 15-16, 1961; April 3-4-5, 1961; May 1-2, and May 3-4, 1961. Mr. Alpine died in February, 1962. (Tr. 6223). Initially, all appellees objected to the use of any part of Mr. Alpine's deposition on the grounds that it was not complete; as various memoranda of his conversations with vendor representatives were



not produced by appellants until after defendants' motion for the production of them had been granted, after Mr. Alpine's death. (Tr. 5204; see 5196-5205). Also see the objections summarized in Motion to Suppress Asserted Deposition of Mr. Arthur Alpine (R. 1325) and supporting Memorandum (R. 1326). The Court's initial ruling was as follows:

"THE COURT: Those portions which were dependent upon assistance of the Court for the purpose of getting memos as to which some cross-examination may have been needed or required, I would be disposed not to permit that..." (Tr. 5200)

Appellees' further objections to the deposition, on the ground of lack of opportunity to cross-examine the deponent concerning the memoranda, and further objections as to relevancy and hearsay, were interposed (Tr. 6213-6233). The Court observed at this time:

"... In other words, while I am satisfied that under the applicable law it is proper for me to permit the reading of the deposition of Mr. Alpine, I do so only provided that there are proper safeguards which guarantee a fairness in the presentation and an opportunity to cross-examine with relation to matters that may not have been completed and as to which there was no cross-examination...." (Tr. 6125)

* * * *

"THE COURT: All right, then I am going to rule that I am not going to permit testimony with relation to conversations as to which a memorandum was made by the witness at the time. Any other conversations will go in." (Tr. 6224-6225)

See, also, Tr. 6229-6230.

At a further hearing, appellees once again interposed their objections to the testimony on the grounds of their failure

to have cross-examination of the deponent upon the memoranda. (Tr. 6245-6247, 6250-6251; see Tr. 6243-6279). The Court proceeded to reject testimony of all conversations where such memoranda were involved. (Tr. 6253-6277). Thereafter, the following colloquy between the Court and counsel for appellants took place:

"MR. KEITH: Your Honor, I believe that after these rulings we would withdraw--rather, not read any portion of the deposition of Mr. Alpine.

"THE COURT: Well, that is about what I was going to ask you, Mr. Keith, in view of the rulings of the Court, if you want to read any further portions of the deposition.

"MR. KEITH: Of course the record will show that we believe this prejudicial to the plaintiffs' case.

"THE COURT: Yes, the record will so show." (Tr. 6277)

The excluded deposition testimony of Mr. Alpine is summarized as follows:

a. Conversations with representatives of G.E.:

Alpine had a luncheon meeting with Mr. Bernard Meseth of G.E., attended by Mr. Bernard Freeman and Mr. Williamson of Manfree, where Alpine offered to buy five carloads of G.E. merchandise. Meseth replied that he could not sell such products to appellants at that time, because of pressure from his other accounts, and because of the G.E. "dealer structureship." When Alpine said this left him no alternative but to transship, Meseth asked him not to do so, and said he would give a definite answer within thirty days. When Alpine subsequently called Meseth, the latter replied that the situation was unchanged. (See

deposition, Tr. 172-181; see Tr. 6253-6254; Pl. Ex. for Id. Nos. 503-A, 503-B, and 508.)

b. Conversations with representatives of appellee Maytag: Alpine recalled several conversations with Mr. Mitchel, from Maytag West Coast. At first, (when Manfree had Maytag products) Mitchel told him appellants were considered one of Maytag's better Northern California accounts. At a later conversation, Mitchell told him that Maytag had had a "change of policy" and that it would not be able to sell to appellants anymore. (Deposition testimony, Tr. 235-238; see Tr. 6257, and Pl. Ex. for Id. Nos. 557 and 558.)

c. Conversations with representatives of Frigidaire: Mr. Alpine recalled having a conversation with Mr. John Shaw of Frigidaire at appellants' premises where Alpine asked for the complete Frigidaire line and said he was ready to order a carload of such products. Shaw replied that Frigidaire thought they might go into the business of selling to discount stores, as Frigidaire felt it should have 25% of the local market but did not, and selling to discount stores might be the way to get such market share; however, Manfree was never able to obtain Frigidaire products. (See deposition testimony Tr. 211-212; 431-436; and see Tr. 6255-6256, 6268; and Pl. Ex. for Id. Nos. 484, 485, and 489.)

d. Conversations with representatives of California Electric: Alpine recalled a conversation with John Muntain, where Muntain told him that he was receiving pressure from his bosses because California Electric was selling to Manfree, as his bosses in turn were receiving pressure from

"their Mission (Street) accounts." (Deposition testimony Tr. 279-280). He testified that Mr. Muntain also repeatedly turned down appellants' requests for co-operative advertising funds in order to advertise Philco products (Deposition testimony Tr. 418). After appellants sent a letter dated June 24, 1960 to appellee requesting permission to purchase Philco appliances, Alpine recalled that Mr. Weaver, from California Electric, called and asked him if he wanted to purchase a carload of merchandise. When Alpine said "yes," Weaver replied that his company didn't have enough merchandise, nor would appellants be able to get "carload prices" on it. (Deposition testimony, Tr. 569-573). Also, see Tr. 6261, 6264-6267, 6271-6274; and Pl. Ex. for Id. Nos. 1776, 1777 and 1778.)

e. Conversation with representatives of Borg-Warner: Alpine testified concerning a meeting with a man identified as a representative from Borg-Warner Credit Corporation in 1957, where he asked him to try to get co-conspirator Lancaster, the Borg-Warner distributor, to sell to appellants. (Deposition testimony, Tr. 192-196; also, see Tr. 6234-6235.)

f. Conversations with representatives of Graybar: Alpine recalled a conversation with either Ray Dickson or Rod Hall, representing Graybar, at the appellants' premises, where the Graybar man noted that his company had not had success selling Hotpoint products to the major retailers, so, having nothing to lose, they were going to sell Hotpoint products to discount houses. He later had a conversation with Mr. Mayben, Sales Manager for Graybar in October, 1958, also at the store premises, when Mr. Mayben told him that Graybar would no longer

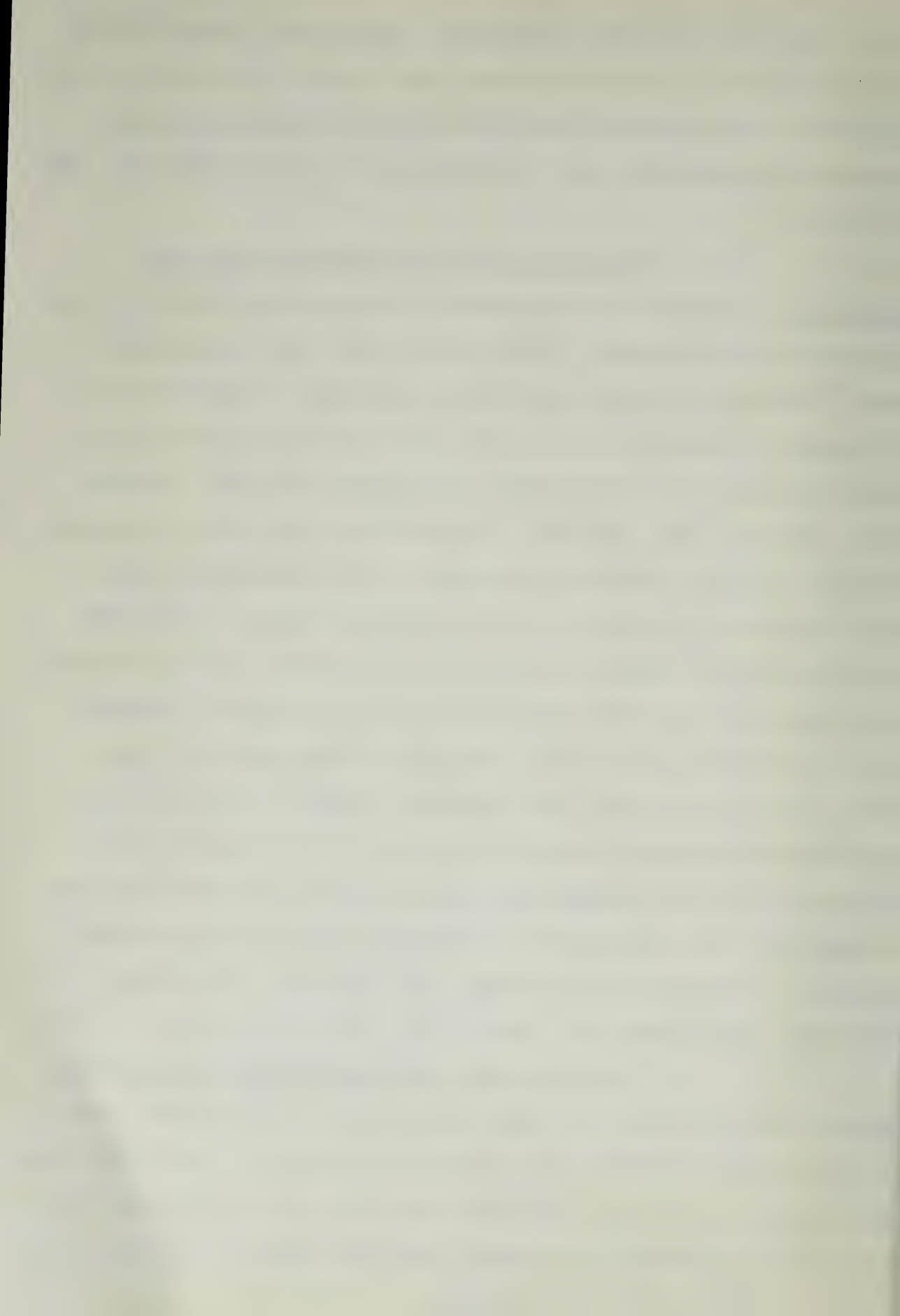
sell Hotpoint appliances to Manfree, because Graybar was going to try to sell to major retailers, and it didn't believe it could penetrate this market as long as it sold to discount houses. (Deposition testimony, Tr. 244-249; see Pl. Ex. for Id. Nos. 498 and 500.)

g. Conversations with representatives of

Lancaster: Alpine recalled numerous conversations with Mr. Jack Mitchell from Lancaster, in the period May, 1957 to October, 1957. Fifteen to twenty days before Lancaster stopped selling to Manfree, Mitchell told him that the Manfree account wasn't worth keeping and "jeopardizing" his other accounts. (Deposition testimony, Tr. 216-219). Alpine also asked Mr. Al Schmidt, who was selling radios for Lancaster, and attempting to sell such products to another concessionaire of U.S.E., if Schmidt would attempt to regain the Motorola television line for Manfree from Lancaster; and that Schmidt promised on several occasions that he would try to do so. (Deposition testimony, Tr. 265-267.) He also recalled that Mitchell refused to provide co-operative advertising money to Manfree, while Lancaster was selling products to appellant, because Mitchell stated that his company did not want any U.S.E. newspaper advertising of such products. (Deposition testimony, Tr. 416-417). See, also, Tr. 6256, 6261, 6264-6267; and Pl. Ex. for Id. No. 550.

h. Conversations with representatives of Meyer:

Alpine testified that Mr. Jack Smith came to appellants' store in the summer of 1957, stated that he was selling the R.C.A. line for Meyer, that he had just come from the Los Angeles area, and could not understand why Manfree could not obtain the R.C.A. line,



as "everyone had it" in Los Angeles. He assured Alpine that he would get the R.C.A. line for Manfree. (Deposition testimony, 253-255.) Mr. Alpine also received notice from Mr. Herb Wolff, an employee of Manfree, that in January, 1960, Meyer gave the R.C.A. radio line to another U.S.E. concessionaire, and told Wolff they were interested in seeing the results of that move, and were sure that in six months appellants would get the complete R.C.A. line of products. (Deposition testimony, 267-268). He also had a conversation with Mr. Erickson of Meyer, when he asked Erickson for a franchise for the R.C.A. electronics line, and for co-operative advertising funds for newspaper advertising. Erickson replied that this request would be sent to the "proper parties." Alpine heard nothing further. (Deposition testimony, 278-279). See, also, Tr. 6260-6261; and Pl. Ex. for Id. Nos. 1683, 1684, 1685 and 1686.

I. Further Substantial and Material Evidence Showing Establishment Of A Conspiracy Between The Appellee And Co-Conspirator Retailers, Distributors, and Manufacturers To Control Market Entry In The Retailing Of The Subject Products In San Francisco, Was Excluded, Or Not Applied

1. The Court refused to apply the testimony of Mr. B. Freeman, relating the reasons given him by Mr. Jack Mitchell of co-conspirator Lancaster, as to why Lancaster would not sell Norge appliances to appellant Manfree. Mr. Freeman's testimony appears at Tr. 5804-5809; objections to such testimony were made that it was hearsay, lacked foundation, and that no connection or relevancy was shown. (See Tr. 5804-5805). The Court ruled as follows:



"THE COURT: Ladies and gentlemen, with relation to conversations with Mr. Mitchell, the same principle I indicated to you previously will apply. I will permit these conversations with Mr. Mitchell. They may be hearsay in character, and whether or not they are admissible will depend on such further rulings as the Court may make later in the trial or at the close of the Plaintiff's case." (Tr. 5805).

In its Memorandum Opinion, the Court indicated that it would not apply this testimony against appellees Borg-Warner or Norge Sales (or any of the appellees). (R. 1912, 1963-1964).

a. Mr. Freeman testified that he knew Mr. Jack Mitchell as a Norge product salesman in charge of the territory including appellants' store, for co-conspirator Lancaster. Mr. Freeman recalled several meetings with Mr. Mitchell concerning the sale of Norge products by Manfree: at one of these, he requested Mitchell to give Manfree advertising money for Norge products, and was turned down. (Tr. 5807). In September or October of 1957, after making many phone calls requesting Mr. Mitchell to come by and discuss the sale of products, Mr. Mitchell met with Mr. Freeman and Mr. Williamson (an employee of Manfree), at which time Freeman asked Mitchell why he hadn't replied to the telephone calls, and why he hadn't responded to orders sent over the telephone by Williamson to Lancaster for Norge appliances. Mr. Mitchell replied that Lancaster would no longer sell appliances to Manfree, because Lancaster had been subjected to pressure from co-conspirator Hale not to sell to appellants, and that if Lancaster did so, Hale would not buy Norge appliances from Lancaster. He also described a meeting of Lancaster officials, at which Mr. W. J. Lancaster

stated that his company would no longer sell to appellants.

(Tr. 5808-5809).

2. The Court excluded the testimony of Mr. Marvin Boyd of Manfree concerning the refusals of certain vendor co-conspirators to deal with appellants.

Objections to such testimony of a conversation with Mr. Newby, a sales manager for co-conspirator Westinghouse, were objected to as being irrelevant; and the Court excluded the testimony on the grounds of lack of foundation (Tr. 5624-5630; see Tr. 5539-5540, and Tr. 5553-5554.)

Mr. Boyd's testimony concerning a conversation with Mr. Erickson, of co-conspirator Meyer, was objected to as being hearsay, and lacking a showing of authority on behalf of the declarant to bind his principal, which objections were sustained (Tr. 5601-5607; see Tr. 5541-5542, 5538-5543, and 5556-5557).

a. Boyd's testimony was that he requested the Westinghouse line from Mr. Newby after Westinghouse had received Manfree's letter of request. Newby replied he could not authorize such sales as it "wasn't his decision". The testimony concerning his conversation with Erickson was to the effect that he met Erickson at a Meyer "Trade Show" to which appellants had been invited, and requested the Whirlpool and R.C.A. lines, but was told by Erickson that "no one was there" who could "take an order" from appellants.

3. The Court excluded Pl. Ex. for Id. Nos. 787, 788, 789 and 790, containing evidence that co-conspirator Meyer investigated the sources of R.C.A. television sets being sold by discount stores in Northern California. These Exhibits were



objected to as being hearsay, and lacking relevancy and foundation, which objections were sustained (TR. 1019-1023; 4501-4503; 4924-4928).

a. Ex. No. 787 is a Meyer intra-company letter between managing agents (March, 1957), questioning whether Meyer should sell R.C.A.-Victor television sets to "Wilson's" in Sacramento who the letter notes owns a discount store in Northern California.

b. Ex. No. 788 is an inter-office memorandum dated January, 1958, requesting a report of the sources of R.C.A. televisions being sold at "C.B.S. in Concord", California; noting that this discount store could obtain such products by transshipping; suggesting that this store sold under a different name with deliveries being made to avoid detection.

c. Ex. No. 789 is a Meyer memorandum from its vice-president to all district managers, requiring reports of all "card-type operations", with listing of nationally-known brands of appliances and televisions carried by such discount stores.

d. Ex. No. 790 is a memorandum dated September, 1958 observing that "Wilson's" (a, above), was going to take over "C.B.S. in Concord", and would undoubtedly ship R.C.A. goods there from Sacramento. It also notes the opening of the "You Save" discount store in San Mateo, directing an investigation by Meyer to find out what merchandise it was carrying, (noting the store had requested R.C.A.-Victor and Whirlpool products).

4. The Court excluded evidence that co-conspirator Westinghouse believed that it could not sell to both large department stores and discount stores in San Francisco at the same time; and that co-conspirator Macy's had requested that there be no



The Court rejected the offer of proof of the testimony of Mr. Hangauer, District Manager of Westinghouse, following objections on the grounds of irrelevancy, hearsay, and calling for an opinion and conclusion. (Tr. 6163, 6176-6177; see Tr. 6127-6133). The Court also excluded Pl. Ex. for Id. Nos. 352(A-B), 479, 480 and 481, pertaining to the same subject matters. The grounds of objection and the transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
481	hearsay, irrelevant, no foundation (Tr. 6147-6148) same (Tr. 6149-6152)	Tr. 6148 (sufficient foundation)
479, 480, 352	hearsay, irrelevant (Tr. 6152-6158)	Tr. 6158

a. Mr. Hangauer would have testified that when he came to San Francisco as General Manager for Westinghouse, from market conditions it was apparent to him that he could not sell his company's products to large specialty appliance, department, and furniture stores, if Westinghouse sold products to the discount stores.

b. Ex. No. 352 is a Westinghouse memorandum dated October, 1962, as a report from Hangauer to the "Regional Manager" mentioning complaints from Macy's and other large retailers about the Westinghouse prices, and reporting statements from retailers that they cannot compete on many Westinghouse products.

Ex. No. 479 is a similar memorandum dated August, 1962, noting comparative G.E., Frigidaire, and Norge prices, and mentioning co-conspirators Macy's and Lachman Bros. as "key accounts", and further noting that neither Frigidaire nor G.E.



would sell to discount houses, and that the R.C.A. distributor had cancelled G.E.M. (a discount store) when the latter brought R.C.A. products in from San Jose for its San Francisco store opening; stating that an R.C.A. representative told him that one couldn't sell to discounters and still obtain cooperation from "key and large T. V. outlets".

Ex. No. 480 is a similar memorandum, dated October, 1962, reporting that in San Francisco, the major appliance business was dominated by such "specialty houses" as Hale, but noting a T. V. sales trend toward "discount houses".

Ex. No. 481 is a similar report of May, 1962, reporting that Westinghouse was openly and actively promoting discount houses in Santa Clara, San Mateo, and San Francisco Counties, but had taken the position that it was going to do business with "key accounts", and limit its distribution to this kind of store, while realizing that under such circumstances, Westinghouse would have to decide "which way to go".

5. The Court excluded the offered testimony of Mr. Marvin Boyd concerning Manfree's attempts to obtain major appliances from Southern California sources. When this testimony was offered, it was objected to as hearsay and immaterial, and after the testimony was permitted over such objection, it was stricken by the Court as hearsay. (Tr. 5569-5571).

a. The stricken testimony was that Mr. Boyd had attempted to obtain Hotpoint products from a discount store in Los Angeles, because of Manfree's inability to get such products locally.

6. The Court excluded evidence that appellee and



co-conspirator vendors sold their major appliances and television sets to other discount stores in Northern California, situated outside of San Francisco.

The Court refused to permit appellants to interrogate the witness Mr. Mayben, representative of co-conspirator Graybar (distributor of Hotpoint) concerning conversations with Hotpoint representatives relative to franchising White Front Discount Stores for Hotpoint goods. (Tr. 3199-3202).

The Court also excluded Pl. Ex. for Id. Nos. 4079, 4080, 4082, 4083, 4084, 4085, 4108, 4266, and 5052, relating to the same subject matter. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4266, 5052	irrelevant (Tr. 5457)	Tr. 5457
4084	irrelevant, no foundation (Tr. 2781-2789)	Tr. 2789
4085		Tr. 2859-2861 (Court's own motion)
4079, 4080, 4082, 4083, 4108	hearsay, irrelevant (Tr. 2623- 2630)	Tr. 2630 (founda- tion established)

a. Ex. Nos. 4079, 4080, 4082, 4083, and 4108 are monthly sales reports for the periods 1963-1964, showing continual, substantial sales by Lancaster of Norge appliances to the White Front Discount Stores in the San Francisco Bay Area, and a Lancaster desk "order card" showing various discount stores in the San Francisco Bay Area (outside of San Francisco proper) as being customers for Norge products.

b. Ex. Nos. 4084 and 4085 are, respectively,



reports of Lancaster sales of Norge appliances (1960, 1961) and Lancaster sales of Motorola appliances to "WASCO", a small retail store in the San Francisco Bay Area, opened by Manfree's ex-manager.

c. Ex. Nos. 4266 and 5052 (A-B) are, respectively, a Hotpoint district salesman's report showing unit sales to the G.E.M. discount stores in the Bay Area (1962 and 1963) and a Hotpoint "request for new customer record" cards as to San Francisco Bay Area White Front Discount Stores.

7. The Court excluded evidence of appellants' written request for major appliances and television sets sent to the vendor appellees and co-conspirators, and their refusals deal with appellants, as offered in Pl. Ex. for Id. Nos. 548, 1691, 1702, 1714, 1754, 1756, 1757, 1758, 1759, 1761, 1762, 1773, 1774, 1815, 1816, 1840, 3049 and 3071.

These various Exhibits consist of letters sent by appellants in June and July, 1960, to the various vendors of the products concerned, requesting that Manfree be supplied with these products; and the written responses received from certain of these vendors. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
548	irrelevant, no foundation (Tr. 4451-4454)	Tr. 4454
1691	no foundation (Tr. 6114-6116)	Tr. 6116
1702, 1774, 1840	irrelevant (Tr. 5969-5970)	Tr. 5970
1714	no foundation, irrelevant (Tr. 5144-5150) (Stipulated to be authentic: Tr. 5114)	Tr. 5150



ExhibitObjectionRuling

1759, 1760, 1761, 1762	no foundation, irrele- vant (Tr. 5977-5978)	Tr. 5978
3049, 3071	no foundation, irrele- vant (Tr. 5592-5598)	Tr. 5598
1815, 1816, 1817	same (Tr. 5978-5979)	Tr. 5979
1773	hearsay, self-serving, irrelevant (Tr. 2621-2623)	Tr. 2623

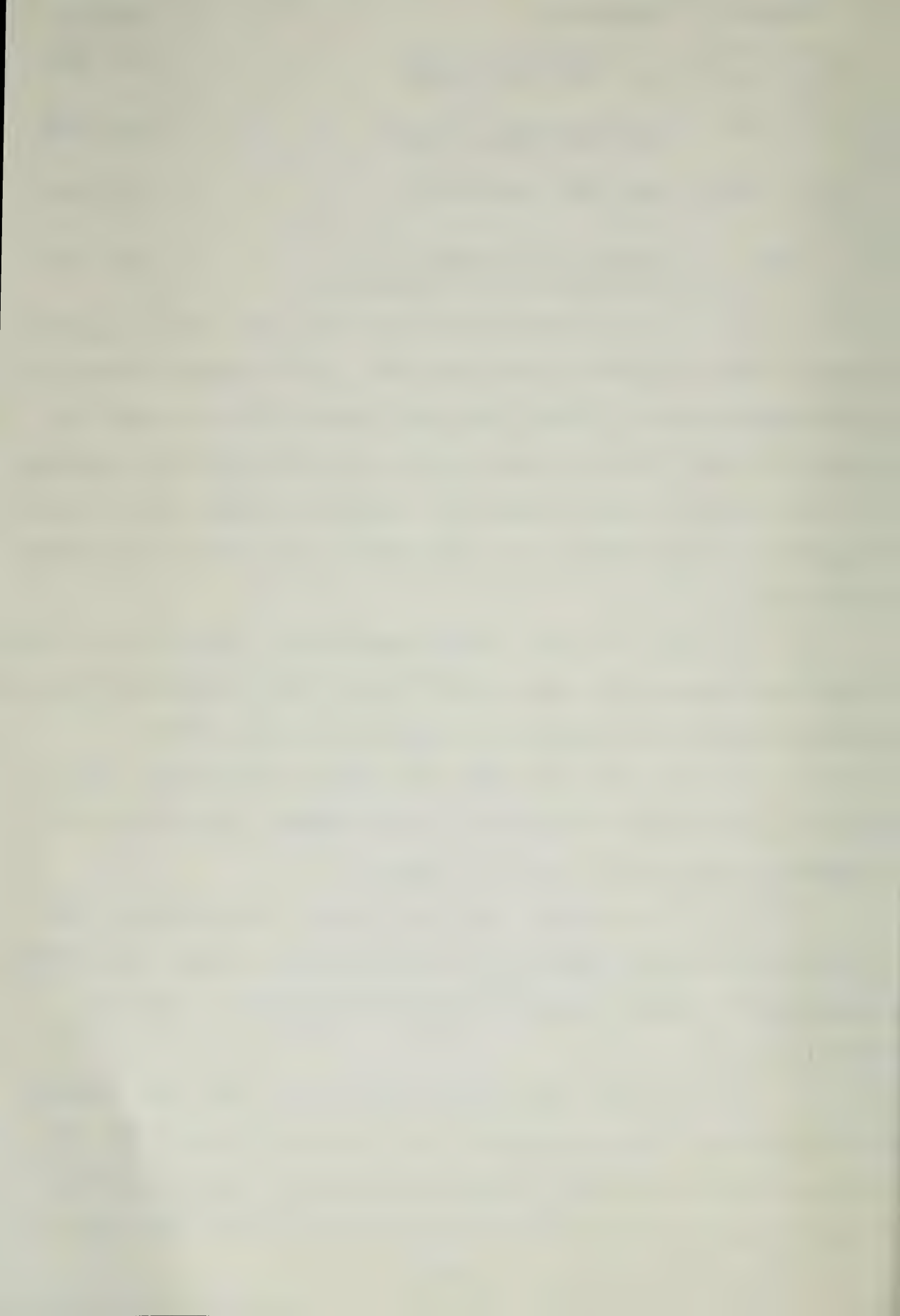
a. Ex. Nos. 1702, 1774, and 1840 concern appellants' letter request to the Cezan Co., a Los Angeles distributor, requesting all lines; its reply referring appellants to Lancaster; and a letter from R.C.A.-Victor Distributing Company of Los Angeles to Mr. Freeman (in response to appellants' letter request), stating that it did not sell to retailers in Northern California.

b. Ex. No. 548 is appellants' letter stating that they had commenced an "open-door" policy, and requesting Hotpoint appliances from co-conspirator Graybar (October, 1961).

c. Ex. No. 1691 is a letter dated July, 1960, from Mr. Alpine to the National Sales Manager, appellee R.C.A., requesting the R.C.A. line of products.

d. Ex. No. 1714 is a letter in September, 1960, from an officer of Whirlpool to co-conspirator Meyer, forwarding appellants' letter request for Whirlpool products, sent to Whirlpool.

e. Ex. Nos. 1759, 1760, 1761, and 1762 consist of appellants' letters of July, 1960, and September, 1961, to co-conspirator Motorola, requesting products; and the replies from officers of that factory to appellants, referring them to



the local distributor.

f. Ex. Nos. 1815, 1816, and 1817 consist of appellants' letters of July, 1960 and September, 1961 to co-conspirator Westinghouse, requesting the Westinghouse line of products.

g. Ex. Nos. 3049 and 3071 are, respectively, appellants' letter of July, 1960 to co-conspirator Sylvania, requesting authority to order Sylvania's products by carload lots; and letter of July, 1960 to co-conspirator Basford, requesting the Zenith line of products.

h. Ex. No. 1773 is appellants' letter of November, 1963 to Norge Sales, requesting the Norge line (Pl. Ex. No. 1775 is the reply by appellee's attorney.)

8. The Court excluded evidence showing that certain vendor appellees and co-conspirators sold small appliances to Manfree and other departments of appellant U.S.E., during the same period of time they were refusing to sell major household appliances and television sets to Manfree, in excluding Pl. Ex. for Id. Nos. 5117 and 5118, and the offer of proof of the testimony of Mr. Bernard Freeman concerning this situation.

Mr. Freeman's testimony was offered at Tr. 5857-5859, and 5863-5866. The Court rejected the offer (for irrelevancy and lack of foundation). (Tr. 5865-5866). Ex. Nos. 5117 and 5118 were objected to as being without foundation and immaterial, which were sustained (Tr. 6559-6601).

a. Mr. Freeman's proposed testimony was that Manfree, and Camrose (another U.S.E. concessionaire) were obtaining vacuum cleaners and radios from Lancaster while that



distributor was refusing to sell the subject products to Manfree as well as the further testimony on other lines of small appliances being obtained, during the period of boycott.

b. Ex. Nos. 5117 and 5118 are studies prepared by appellants showing the purchases of small appliances by concessionaire Camrose from co-conspirators Graybar and Westinghouse and appellee G.E., during the periods 1958 to 1961, and 1957 to 1964.

9. The Court excluded written evidence of attendance by the retailer co-conspirators at meetings in San Francisco concerning advertising rules to be established by them and a select group of other retail stores; and that Mr. Schreck, an officer of Sterling who attended such meetings, approached representatives of the San Francisco Call Bulletin newspaper to have it cease accepting appellants' advertising. This evidence is contained in Pl. Ex. for Id. Nos. 453, 384, 390, 391, 392-A, 393-A, 400, 403 and 404. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
384		Tr. 382-383 (Court wrong witness)
	hearsay, irrelevant, no foundation (Tr. 1569-1599)	Tr. 1599
	same (Tr. 6595-6596)	Tr. 6596
390	hearsay, irrelevant (Tr. 383-386)	Tr. 386
391	same (Tr. 1583-1586)	Tr. 1586
	same (Tr. 2323-2325)	Tr. 2325
400	hearsay, irrelevant (Tr. 2342-2343)	Tr. 2343 (no foundation)
	irrelevant (Tr. 6595-6599)	Tr. 6599



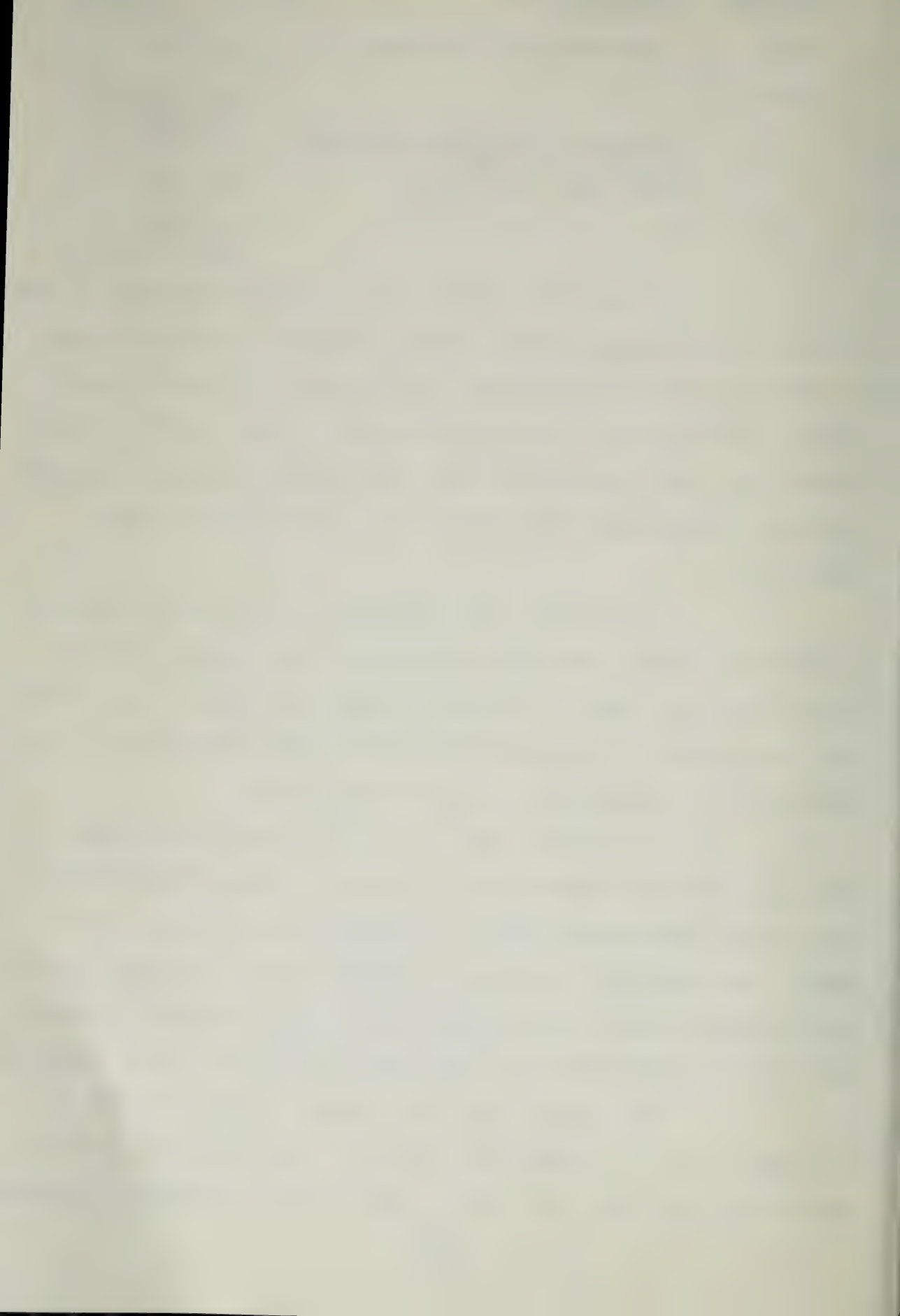
<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
453	irrelevant (Tr. 380-382)	Tr. 382
403		Tr. 1156-1157 (cumulative)
	hearsay, irrelevant, no foundation (Tr. 1247)	Tr. 1247
	same (Tr. 4931-4935)	Tr. 4935
404		Tr. 5694 (cumulative)

a. Ex. No. 453 is a letter dated February 9, 1959 to the Better Business Bureau of San Francisco ("B.B.B.") from Mr. Sanford of Hale stating that San Francisco retailers must jointly check out all "comparative price" claims made in retail advertising, and noting that Hale was going to discontinue such practices (complaints had been made to the B.B.B. by other retailers.)

b. Ex. No. 384 are minutes of a B.B.B. meeting in November, 1958, containing definitions and explanations of various pricing terms, including "comparative price" and "deceptive comparative", to be used by all San Francisco retailers in following the proposed B.B.B. advertising code.

c. Ex. No. 390 is a B.B.B. memorandum dated February, 1959, to members of the "Home Furnishing Advertising Committee" (representatives of co-conspirators Lachman Bros., Macy's, and Redlick) enclosing a sample letter to be sent to all San Francisco retail advertisers concerning "standards of practice" to be adopted by the local home furnishings retail industry.

d. Ex. No. 391 is a letter of March, 1959 to Mr. Redlick, of co-conspirator Redlick, concerning the matters discussed in Ex. No. 390, with a copy of the "standards" attached.



e. Ex. No. 392-A is B.B.B. letter dated May, 1959, to Mr. Lachman of co-conspirator Lachman Bros., as chairman of the advisory committee, forwarding a letter of complaint to Sterling about its advertising, and referring to similar advertising copy by Lachman Bros. that transgressed the proposed code.

f. Ex. Nos. 393 and 393(A, B) consist of correspondence from B.B.B. dated May, 1959, to Mr. Schreck, of co-conspirator Sterling, and enclosing a copy of newspaper advertising by Sterling showing a "price differential" which was against the proposed advertising code.

g. Ex. No. 400 are the minutes of the B.B.B. "advisory committee" from its meeting of March 29, 1959, discussing further the common advertising terms used by local retailers, and criticizing the advertising of the manufacturers' list price "which is not the prevailing retail price in this area."

h. Ex. No. 403 is a letter dated June, 1960 from Schreck of Sterling to Mr. Sanford, then with co-conspirator Meyer, noting it was a pleasure to have had lunch with him.

i. Ex. No. 404 is a voucher filled out by Mr. Leary, a representative of the San Francisco News Call Bulletin, noting a lunch on June 18, 1960 with Mr. Schreck and other representatives of the newspaper at the San Francisco Olympic Club, "re Sterling."

10. The Court excluded the testimony of Mr. Mittelman concerning a statement to him by a representative of the San Francisco News Call Bulletin reporting that representatives of



co-conspirator retail stores had requested that newspaper to cease accepting appellant U.S.E.'s advertising.

The offer of this testimony appears at Tr. 2123-2135. Objections were made to this testimony as being hearsay, and as being of statements made by a representative of a party not named as a co-conspirator, which objections were sustained (Tr. 2125-2134).

a. The proposed testimony was that Mr. Mittelman had been told by Mr. Wilcox, an advertising representative for the Call-Bulletin, that U.S.E. advertising could not be accepted because of pressure put on the newspaper to reject discount store advertising, by the established retail stores in San Francisco who advertised in the paper.

11. The Court excluded evidence that appellee and co-conspirator manufacturers who were members of N.E.M.A., adopted common programs with respect to definitions of and statistical reporting of sales information as to discount stores, in excluding Pl. Ex. for Id. Nos. 2093 (A,C-E), 2094 (A,C-M), 2095 (A,F-G), 3003, and 3010.

Appellants' offer of proof concerning the evidence relating to activities of N.E.M.A. appear at Tr. 6457-6470. Objections were made to this evidence as being hearsay, and without foundation and relevancy (Tr. 6466). The Court held that such evidence was not relevant (Tr. 6467, 6470).

a. Ex. Nos. 2093 and 2094 are N.E.M.A. minutes of the meetings of the Board of Directors of the Consumers Products Division (October, 1961, and October, 1962, respectively). Ex. No. 2093 discusses the "new phenomenon" of "mass



retailing", which use appliances as a "come-on" for other merchandise, noting that as the industry "shares" all individual new manufacturing techniques, the members should share all developments in "advancements in distribution" (immediately after discussing discount houses), and recommends that the Association make studies of such new developments.

Ex. No. 2094 notes that the Association decided to limit the information from its statistical reporting of sales program to N.E.M.A. members only; discusses a proposed letter from N.E.M.A. to all "mass merchandisers" to obtain from them the final destination of all appliances shipped to their outlets (to secure more information from this type of retailer to fit into the Association's county-by-county statistical sales analysis); deciding that each individual member should have its distributors obtain this information.

b. Ex. No. 2095 are minutes of an N.E.M.A. sub-committee on county operations, statistical and market analysis, for January, 1963, containing further discussion on the proposed letter from the Association to mass merchandisers (see above), deciding to have each member write its own letter to its distributors to gather such information, thus "clearing up" the problem of getting accurate sales report for N.E.M.A. statistical sales analysis.

c. Ex. No. 3010 are the minutes of Special N.E.M.A.-A.H.L.M.A. Committee on "Dealer Classifications", of January, 1962 (showing that G.E., Frigidaire, Westinghouse, Maytag, Hotpoint, Borg-Warner, and E.I.A. representatives were present), which discusses the need to improve industry

information on statistics of sales by various categories of dealers; noting that the development of information of sales by discount stores presents problems; recognizing the need for a new, individual sales report as to this particular type dealer in comparison to all others; and containing a long and extended definition and description of discount stores and their history (noting that they emphasize "low prices"), and including an extensive listing of discount stores situated throughout the United States.

12. The Court excluded evidence that statistical information prepared by N.E.M.A. and A.H.L.M.A. was not made available to those not a member of this trade association, in excluding Pl. Ex. for Id. Nos. 2094 (A, C, N), 2097 (A, F, S) and 2098 (A, M). The Court's rulings on objections to this evidence are set out above; as well as a statement of the substance of such exhibits, except for Ex. Nos. 2097 and 2098.

a. Ex. No. 2098 are minutes of the Electric Dishwasher Section of N.E.M.A., of May, 1962, showing that it voted to permit only members of the section to have access to statistical sales information prepared by the Association.

b. Ex. No. 2097 are minutes of the N.E.M.A. Board of Directors, Consumer Products Division, of May, 1961, setting out the change in N.E.M.A. policy that each section may exclude non-members from having access to the statistical sales information; and noting that this information is the biggest advantage to N.E.M.A. membership.

13. The Court also excluded evidence that the members of N.E.M.A. and A.H.L.M.A. exchanged information as to sales by

price classification, in excluding Pl. Ex. for Id. Nos. 2099

(A, G, H, O), 3000 (A, M), 3004 (A, K), 3036 (AE-AF), and 3024.

Objections to such evidence as being hearsay and without foundation and relevancy (Tr. 6466) were sustained. (Tr. 6467-6470).

a. Ex. No. 2099 are minutes of the N.E.M.A. Market and Statistical Analysis Section, of February, 1961, noting that there was to be a quarterly report of dishwasher sales of all members, by factory price classification, and a report of manufacturers' total dollar amount of sales classified by factory selling price, (defined by excluding certain uniform, agreed-upon cost items).

b. Ex. Nos. 3000 and 3004 are N.E.M.A. statistical bulletins (1963, 1964) reporting domestic sales of various appliances classified by the manufacturers' factory prices and by industry-standardized capacity ratings, (including sales to distributors and "direct dealers") utilizing a uniform definition of manufacturers' "factory price".

c. Ex. No. 3024 is an A.H.L.M.A. statistical analysis of factory sales by the manufacturers' selling prices, for 1959.

d. Ex. No. 3036 is an A.H.L.M.A. study prepared for the Association's Board of Directors in 1963, showing factory sales classified by the manufacturers' selling prices, and the total amount and location of factory inventories.

14. The Court also excluded evidence that a representative of E.I.A. (Electrical Industry Association, of which appellee R.C.A. is a member) attended N.E.M.A. meetings, and

that there were joint meetings of N.E.M.A. and A.H.L.M.A., by excluding Pl. Ex. for Id. No. 3010.

15. The Court excluded evidence that appellee Borg-Warner, and other manufacturers of major appliances, determined not to approach the Federal Trade Commission concerning a proposed advertising code to be promulgated by A.H.L.M.A., in excluding Pl. Ex. for Id. No. 3026.

Objections to Ex. No. 3026 were made on the grounds that it was hearsay and irrelevant, which were sustained (Tr. 3508-3509, 6475-6477).

a. Ex. No. 3026 is an A.H.L.M.A. letter dated October, 1959, to Mr. Bull of Norge Sales, concerning the Association's proposed establishment of a voluntary code on advertising practices to be followed by the Home Laundry Industry which would be designed to control dealer advertising "where real problems exist", indicating a concern about "promotional price" violations of the Robinson-Patman Act, and contains a strong recommendation that the Association not approach the F.T.C. for review or approval of such a code.

16. The Court excluded appellants' studies showing that retailer co-conspirators had maintained the manufacturers' and distributors' list prices as their "tag" prices on the subject products.

These studies are Pl. Ex. for Id. Nos. 1561-1578 (Hale); 1579-1681 (Lachman Bros.), and 1560 (Redlick). Examination of appellants' expert witness who prepared such studies appears at Tr. 6365-6402. Objections on lack of foundation (Tr. 6382, 6385) and relevancy (Tr. 6382, 6395) were sustained

17. The Court excluded appellants' studies showing the dollar volume purchases by co-conspirator retailers of major appliances and television sets from the co-conspirator and appellee vendors, in excluding Pl. Ex. for Id. Nos. 4334, 4336 and 4340.

Examination of appellants' expert witness concerning the preparation of these studies appears at Tr. 6324-6335. Ex. No. 4334 was objected to as being self-serving, hearsay, and without foundation or relevancy (Tr. 6329); the Court initially reserved ruling (Tr. 6335-6336) and then upheld the objections. (Tr. 6358). Ex. Nos. 4336 and 4340 were subjected to the same objections (see Tr. 6360-6361), and the same ruling (Tr. 6361).

18. The Court excluded appellants' studies showing cooperative advertising credits allowed to Hale and other retail store co-conspirators, by the co-conspirator and appellee vendors

This evidence was contained in Pl. Ex. for Id. Nos. 4335, 4337, 4339, 1491 and 1492. Appellants' expert witness was examined at length concerning the preparation of Ex. No. 4335 (Tr. 6324-6335, 6336-6358). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4335	irrelevant, prejudicial, argumentative (Tr. 6365-6368)	Tr. 6368
4337, 4339	same (Tr. 6329, 6358)	Tr. 6361
1491, 1492	hearsay, irrelevant, no foundation (Tr. 6363)	Tr. 6364

19. The Court excluded comparison evidence of the

with nationally advertised list prices of appellees R.C.A., and Whirlpool, in excluding Pl. Ex. for Id. Nos. 5064 and 5082.

Objections to these exhibits as being hearsay, without foundation, and cumulative (Tr. 6588-6589) were sustained (Tr. 6

a. Ex. Nos. 5064 and 5082 are reproductions of R.C.A., Whirlpool and Meyer price lists (comparitive), showing in most cases complete similarity between the distributor's suggested retail price, and that of the appellee manufacturers.

20. The Court rejected Pl. Ex. for Id. Nos. 1500 and 1501 being a compilation of Manfree's sales and profits for the period 1957-1964. These exhibits were objected to as hearsay, lacking foundation, and without relevance, which were sustained. (Tr. 63

21. The Court rejected appellants' offer of proof of testimony of Mr. Sam Fractenberg, former officer of "Klor's, Inc. (a retail store in competition with Hale), showing that Hale asked distributor representatives to specify the names of retailers being sold products by such distributors in San Francisco; that his store was unable to obtain R.C.A. televisions, Philco appliances, and other major appliance and television lines because of orders from Hale to the vendors selling such items.

Upon appellants' offer of this testimony (Tr. 5665-5684), objections were made that it was hearsay, irrelevant and authority had not been established on the part of the witness to speak for his purported principal (Tr. 5674), and that Mr. Fractenberg had not been listed as a potential witness in appellants' pre-trial pleadings. (Tr. 5677-5680; 5682). The Court

been listed as a potential witness, pursuant to pre-trial order (Tr. 5682-5683). This testimony was also offered as impeachment of the testimony of Mr. Lau, a representative of G.E., but the Court denied that request (Tr. 5683-5684).

a. The offered testimony would show that Mr. Fractenberg had been a sales representative for Admiral appliances until June, 1955, when he joined Klor's. While with Admiral, and calling upon Hale, he was repeatedly asked by Mr. Hurd, a Vice-President, to name the other dealers selling Admiral products. While with Klor's, he asked Mr. Lau, a television salesman for G.E., why Klor's could not obtain G.E. televisions, and was informed by Lau that he had received notice that he was not to sell such products to Klor's any longer. In attempting to obtain R.C.A. televisions from Meyer, Mr. Fractenberg was told by Mr. Henry, a Vice-President, that Meyer could no longer sell such products to Klor's, but he refused to give a reason why. Mr. Fractenberg was told by Mr. Brolan, a Meyer television salesman, that his company did not want to sell to Klor's because Hale did not want it to have such products, and Meyer did not want to jeopardize their position with Hale. He would also testify as to a luncheon meeting with Mr. Shuster (at the time a Sales Manager for a San Francisco distributor of Philco products) where Shuster asked that Klor's give up the Philco line, because Hale had said that it would not do business with the distributor as long as Klor's was selling Philco. When Mr. Fractenberg said that his store would not give up the line, he was told that Klor's would no longer be able to obtain Philco products from



that company, which in fact occurred. Mr. Fractenberg would further testify that he was unable to obtain the Zenith, Emerson, Whirlpool, and other major lines of appliances, under similar circumstances, and that the Klor's store closed in January, 1957 because of its inability to obtain the leading brands of major appliances (Tr. 5666-5672).

22. The Court also excluded additional evidence concerning the inability of Klor's to obtain major appliances and television sets due to directions to vendors from co-conspirator Hale not to sell to that store.

Appellants offered the deposition testimony of Mr. George Klor, President of Klor's, Inc., from another lawsuit. (See Pl. Ex. for Id. No. 5025; Tr. 3973-3975). The Court rejected several offers of this testimony, apparently on the grounds that it was irrelevant. (See objection of appellee Borg Warner on such grounds, at Tr. 5312.) Appellants' offers and the Court's rulings appear at Tr. 3973-3975; 4343-4346; 4400-4401; and 5305-5313. See, also, Tr. 1537-1540.

a. The substance of the offered testimony to be given by Mr. George Klor was that his store, situated immediately adjacent to Hale's appliance store on Mission Street in San Francisco, was selling small G.E. appliances, but could not obtain major appliances; that he asked Mr. Lau, G.E. salesman (who testified in this case), if Klor's could obtain the full G.E. appliance line, upon which Mr. Lau replied that Klor's could not have such products because of Hale; and that his store was never able to obtain such products (Tr. 4343-4346).

THE TRIAL COURT ERRONEOUSLY REFUSED TO APPLY EVIDENCE OF STATEMENTS AND ACTS OF REPRESENTATIVES OF AN APPELLEE OR CO-CONSPIRATOR AGAINST IT, AND REFUSED TO GIVE SUCH EVIDENCE PROBATIVE VALUE

A. The Court Erroneously Ruled That Appellees Were Not Bound By The Adverse Testimony Of Their Employees:

1. The error set out in specification V(A)(1) hereinabove is incorporated. The other rulings, and witnesses concerned are as follows:

a. Mr. Gentile (Field Sales Representative of R.C.A. for the entire State of California). Tr. 4645-4648, 4748-4750, and 4753-4754.

b. Mr. Brightbill (Field Sales Representative of R.C.A.). Tr. 4754, 4760-4761, 4799-4802.

B. The Court Erroneously Ruled That Managing Agents Of Appellees, Who Were No Longer So Employed At The Time Of Trial, Were Not Representatives Of Adverse Parties Under Rule 43(b), And Prevented Impeachment Of Those Witnesses:

1. The witnesses involved, and the rulings thereon, are found as follows:

a. Mr. Sanford, former General Manager, Appliance Division, co-conspirator Hale (Tr. 504-507, 518-521); and former Vice-President, co-conspirator Meyer (Tr. 1191-1192).

b. Mr. Satterfield, former Regional Sales Manager, co-conspirator Philco (Tr. 3586-3587, 3548-3551).

c. Mr. Muntain, former salesman, appellee California Electric (Tr. 3932-3933, 3940-3941).

d. Mr. Lau, former sales counselor, appellee G.E.

C. The Court Erroneously Ruled That
Certain Witnesses Were Not Hostile
And Adverse To Appellants:

1. The witnesses concerned, and the rulings of the Court may be found, as follows:

- a. Mr. Schreck (Tr. 1651-1653, 1657-1659).
- b. Mr. Tobin (Tr. 2205-2208, 2224-2228).
- c. Mr. Erickson (Tr. 4846).
- d. Mr. Carlson (Tr. 4983-4984)

VII

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN DENYING APPELLANTS FULL SCOPE
OF CROSS-EXAMINATION, OR REHABILITA-
TION ON REBUTTAL, CONCERNING MATTERS
RAISED BY APPELLEES IN THEIR EXAMINA-
TION OF WITNESSES

The witnesses concerned and the rulings of the Court appear as follows:

- a. Mr. Sanford (Tr. 1037-1038)
- b. Mr. Thomas (Tr. 1537-1540).
- c. Mr. Tobin (Tr. 2227-2230).
- d. Mr. Schreck (Tr. 1657-1659, 1773-1774; and
see 1769-1770).
- e. Mr. Fuller (Tr. 1852, 1873-1876; see 1866-
1873).
- f. Mr. Laird (Tr. 1981-1983, 1995-1996, 2021-
2029; see 1965-1978).
- g. Mr. Redlick (Tr. 2275-2279).
- h. Mr. Mayben (Tr. 3290-3293, 3297-3302; see
3264-3272, 3276-3285).
- i. Mr. Rising (Tr. 3865-3867).

j. Mr. Muntain (Tr. 3939-3941).

k. Mr. Mitchel (Tr. 3417-3419).

l. Mr. Shaw (Tr. 4309, 4313, 4324-4325; see 4322).

m. Mr. Bernard Freeman (Tr. 6055-6057; see G.E. Exhibit No. 8350, Tr. 6030-6036).

VIII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANTS DISCOVERY OF DOCUMENTS RELEVANT AND MATERIAL TO THE ISSUES IN THIS CASE, OR LIKELY TO LEAD TO THE DISCOVERY OF SUCH EVIDENCE

- A. The Court Erroneously Denied Production Of Documents Described In Items 10 And 11 Of Plaintiffs' Motion For An Order To Show Cause Why Documents Should Not Be Produced By Defendant Frigidaire Sales Corporation.

1. Appellants' moving papers appear at R. 298, the Court's order at R. 419, 420; see Pre-Trial Hearing of April 17, 1964 (P. Tr. 2-7, 21-23).

- B. The Court Denied Plaintiffs' Motion For An Order To Show Cause Why Documents Should Not Be Produced By Defendant R.C.A.

1. Appellants' moving papers appear at R. 323, the Court's order at R. 413, 414; see Pre-Trial Hearing of April 17, 1964 (P. Tr. 25-84).

- C. The Court Denied Production of Documents Described In Item 15 Of Plaintiffs' Motion For The Production Of Documents Addressed To The Factory Defendants.

1. Appellants' motion, and the description of the items demanded, appear at R. 422, 425. See Pre-Trial Hearing of August 7, 1964 (P. Tr. 88-90).

Described In Item 19 Of Plaintiffs
Motion For The Production Of Documents
Addressed To The Distributor Defendants.

1. Appellants' moving papers, and the description of the documents concerned, appear at R. 434, 437. See Pre-Trial Hearing of August 7, 1964 (P. Tr. 88-90).

E. The Court Refused To Require Appellees G.E., Whirlpool, R.C.A. And Co-Conspirator Hale To Answer Questions Nos. 2, 3, 4, 5 and 6 of Plaintiffs' Interrogatories.

1. These interrogatories appear at R. 625, the Court's order at R. 671. See Pre-Trial Hearing of August 16, 1964 (P. Tr. 6-10).

F. The Court Denied Production Of Documents Described Under Items 20, 22(c)-(e), And 27(f) Of Plaintiffs' Motion For The Production Of Documents Addressed To Factory Defendants.

1. The description of these items appears at R. 745, 750, 751-752. See, also, Pre-Trial Hearing of December 30, 1964 (P. Tr. 109-113, 115, 116-119, 124-127, 174-182, 188); and of December 31, 1964 (P. Tr. 234-237, 247-248, and 256).

G. The Court Refused To Require Appellees G.E., Whirlpool, And R.C.A. To Answer Questions Nos. 1, 2, 3 and 6 Of Plaintiffs' Second Interrogatories Addressed To All Defendants.

1. The interrogatories appear at R. 790, 791, 792, and 793. See Pre-Trial Hearing of December 30, 1964 (P. Tr. 197-200, 203-205).

IX

THE TRIAL COURT PERMITTED A PREJUDICIAL ERROR IN TAXING CERTAIN ITEMS AS COSTS AGAINST APPELLANTS

No. 20,770

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation, et al., VS. GENERAL ELECTRIC COMPANY, a New York corporation, et al.,	}	<i>Appellants,</i> <i>Appellees.</i>
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BRIEF OF APPELLEE
RADIO CORPORATION OF AMERICA

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**BRIEF OF APPELLEE
RADIO CORPORATION OF AMERICA**

STATEMENT OF JURISDICTION

The District Court had jurisdiction of the actions brought by appellants against appellees, including Radio Corporation of America (hereinafter referred to as "RCA"), under sections 4 and 16 of the Act of October 15, 1914 (the Clayton Act), 38 Stat. 731, 737, 15 U.S.C. 15, 26 (R.¹ 1-14, 15-27).

¹As in appellants' opening brief, the clerk's transcript of record will be cited in this brief as "R."; the reporter's transcript of the oral proceeding at trial will be cited as "Tr." The transcripts of the pretrial hearings will be referred to by date and subject matter (e.g., "Rep.Tr. of Hearing on Motion, Dec. 30, 1964"). Exhibits admitted into evidence will be cited "Exh." Exhibits not admitted into evidence but marked for identification will be cited "Exh. for Ident."

The District Court had jurisdiction pursuant to Rules 50(a) and 41(b) of the Federal Rules of Civil Procedure to grant a directed verdict and dismissal of the action as to appellee RCA at the close of the evidence offered by appellants.

Judgment was entered in favor of appellee RCA on November 26, 1965 (R. 1977). Appellants filed their notice of appeal on December 1, 1965 (R. 2048). This Court has jurisdiction over the appeal under Title 28 of the United States Code, section 1291.

PRELIMINARY STATEMENT

In prosecuting their appeal against RCA, appellants have the burden of establishing that there was evidence which would support two propositions:

- (1) That there was a conspiracy to boycott appellants; and
- (2) That RCA was a party to such conspiracy.

We respectfully submit that appellants did not present any evidence which would support the first proposition. But *even if it be assumed* that appellants have presented sufficient evidence to allow a jury to infer the existence of a conspiracy, they did not introduce any evidence from which a jury could reasonably infer that RCA was a party to such a conspiracy.

RCA has been and is a manufacturer of television sets. It was not in the business of distributing television sets to retailers in Northern California. On the contrary, RCA sold the television sets it manufactured to an independent

distributor. That distributor decided to which retailers it would resell those sets. Appellants have not shown—and cannot show—that RCA participated in those decisions or attempted to control the price at which retailers sold television sets. There is just no evidence, nor is there any reasonable inference from the evidence, to support appellants' claim against RCA.

STATEMENT OF THE CASE

RCA did not sell to retailers in San Francisco; it sold only to distributors (Tr. 4545-4546). RCA-manufactured television sets were distributed in Northern California by Leo J. Meyberg Co., by its successor, A. H. Meyer Co., and after May 31, 1965, by Callectron, Inc. (App.Opn.Br., p. 10). These distributors will be collectively referred to as "Meyer."

The evidence showed without contradiction that Meyer purchased television sets from RCA, f.o.b. point of shipment; that Meyer paid the freight; and that Meyer determined to whom it would sell television sets and did not discuss those decisions with any representative of RCA (Exh. 88; Tr. 1332-1336, 4546). The distributor's merchandise was its own property, and RCA made no attempt to aid distributors in disposing of unsold merchandise (Tr. 4611-4613).

Appellants point out that national firms avail themselves of lower local newspaper advertising rates by making funds available to local concerns for local advertisement of the national product (App.Opn.Br., p. 30). Dis-

tributors of television sets manufactured by RCA received "cooperative" advertising funds² from RCA, based upon the amount of their purchases, to be used as the distributors saw fit for local advertising by the distributor, retail dealers, or both (Exh. 99, pp. 2-3). Whenever RCA thought that more local advertising was advisable, distributors desiring to participate would receive supplemental cooperative advertising funds (Tr. 4558-4559; Exh. 99, p. 3). Distributors obtained credit for these funds from RCA by submitting requests containing substantiation of the advertisement to an independent advertising agency (Exh. 99, pp. 28-31).

RCA's contributions were made with the understanding the distributor would "accord all competing [retail] dealers proportionately equal treatment" (Exh. 99, p. 2; Tr. 4615). However, the funds were expended by the distributor at its discretion (Exh. 99, p. 1). Thus, Meyer determined which retailers would participate and the terms on which they would participate in cooperative advertising funds (Tr. 1334).

In order to maintain the commercial value of RCA trademarks, RCA did stipulate that "any advertising which is misleading or, because of its bad taste, unfair product comparisons or other deceptive or questionable advertising techniques, contrary to the established policies of RCA, is not eligible against Co-op funds" (Exh. 99, p.

²The funds are cooperative because both the distributor and RCA contribute to them (Exh. 99, p. 4).

10; Tr. 4617-4618), but RCA did not care whether advertisements showed less than suggested prices (Tr. 4606).

RCA also provided suggested retail prices to its distributor, Meyer, but Meyer was not required to and did not follow those suggested prices (Tr. 1242-1245; Exhs. 1947, 1948, 5114, 5116).³

After appellants filed their first complaint (R. 1-14), they wrote to RCA on September 25, 1961, and again on November 20, 1963, requesting that RCA sell directly to them (Exhs. 1692, 1698).⁴ RCA referred these letters to Meyer (Exhs. 1695, 1697).

In the meanwhile, as appellants point out (App.Opn.Br., pp. 59-60), Meyer received a request from appellants in June, 1960, to sell them television sets manufactured by RCA, but Meyer refused to do so. This determination by Meyer was made without any consultation with RCA (Tr. 4728, 4742, 4743).

Appellants settled the action insofar as Meyer was concerned (R. 1914). No settlement, however, was made with RCA, and the case proceeded to trial. At the close of plaintiffs' case, RCA moved for a directed verdict and dismissal of the action as to it (Tr. 6723; R. 1807), which motion was granted (Tr. 6916; R. 1928-1929).

³The labored attempt of appellants to show uniformity between RCA's and Meyer's suggested resale prices (Exhs. 5114, 5116) in fact shows that 58.98 per cent of the prices were different, even excluding all those instances when Meyer had, but RCA did not have, suggested resale prices.

⁴Appellants also claim that they had written to RCA on July 13, 1960 (Exh. for Ident. 1691)—one month prior to the lawsuit—but that letter was never received by RCA (Tr. 4561, 4710).

SUMMARY OF THE ARGUMENT

The District Court dismissed RCA from the actions because “[t]here is no evidence that RCA conspired with anyone” (R. 1923) and “no evidence from which a jury could reasonably or fairly infer that RCA participated in or had knowledge of a conspiracy” (R. 1928).

Appellants have not and, we submit, cannot point to any evidence which would refute those determinations.

Appellants rely on the doctrine of conscious parallelism, but defendants’ conduct was not parallel and, in any event, conscious parallelism is not in itself sufficient to establish a conspiracy.

Appellants rely on evidence that RCA furnished suggested retail price lists to its independent distributor, but RCA’s suggested prices were only suggested guide lines, which were disregarded whenever the distributor wished to do so. There is no evidence that RCA’s suggested lists were even shown to retailers. RCA was simply unconcerned with the prices charged by retailers in San Francisco.

Although RCA furnished its *distributor* with funds to be used in advertising RCA-manufactured television sets as part of its cooperative advertising policy, those funds were expended solely by the distributor and were not used by RCA to control prices.

The distributor to which RCA sold its television sets in San Francisco was not the agent of RCA.

RCA did not give, or have anything to do with, any special treatment alleged to have been given to any competitor of appellants in San Francisco.

For the foregoing reasons, as the court below held, appellants "failed to make a case against RCA" (R. 1928). Not content with arguing this basic issue, appellants also attack virtually every adverse ruling on discovery, the admission of evidence, pretrial settlement of issues and procedure and also taxation of costs. Our answer to those charges, insofar as they pertain to RCA, may be summarized as follows:

Appellants' assertions of abuse of discretion with respect to the discovery orders pertaining to RCA find no basis in the record. Nor is there any support for appellants' contentions with respect to the trial court's evidentiary rulings. Most of the excluded exhibits or testimony on which appellants rely were hearsay, or without any proper foundation. In any event, none of them would support the claim that RCA participated in the alleged conspiracy.

Appellants also attack the court's pretrial order delineating the issues and separating the issue of liability from that of damages and the taxation of costs. The pretrial order was in all respects proper and, in any event, could not have prejudiced appellants. Likewise, there is no error in the trial court's orders taxing costs in favor of RCA.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT "THERE IS NO EVIDENCE THAT RCA CONSPIRED WITH ANYONE."

RCA does not belong in this action for the simple reason that it did not sell to retailers in Northern California (Tr. 4545-4546). It sold f.o.b. point of shipment to an independent distributor, Meyer (Exh. 88; Tr. 1333, 4546). RCA did not deal with appellants but neither did it deal with appellants' competitors. It was not a participant in the market within which appellants operated.

As the trial court pointed out:

"There has been no evidence to support plaintiffs' theory that Meyer was RCA's agent in selling RCA brand television sets to retailers" (R. 1923).

* * * * *

"* * * The record is devoid of any evidence of an agreement between RCA and anyone to combine or conspire in the manner charged or in any other manner. Nor is there any evidence from which a jury could reasonably infer the existence of such an agreement or combination" (R. 1925).

* * * * *

"* * * there is no evidence that San Francisco retailers were required by RCA to adhere to RCA's suggested prices, or that they did so" (R. 1928).

Accordingly, the trial court determined that

"Plaintiffs have failed to make a case against RCA. There is no evidence from which a jury could reasonably or fairly infer that RCA participated in or had knowledge of a conspiracy" (R. 1928).

A. RCA did not sell television sets to retailers in Northern California.

Appellants' attack upon the lower court's decision seems to be based primarily upon RCA's refusal to sell television sets directly to appellants (App.Opn.Br., pp. 97-101, 123-127). However, as the lower court pointed out, "RCA was simply not engaged in the business of selling to retailers in San Francisco, where the alleged conspiracy is charged to have taken place" (R. 1925).

RCA sold only to distributors in Northern California, and the court below correctly stated:

"A preference for dealing with past customers does not raise an inference of conspiracy. *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*; *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F.2d 789, 798-799 (4 Cir. 1951); *G & P Amusement Co. v. Regent Theatre Co.*, 107 F.Supp. 453, 459 (N.D.Ohio 1952), *aff'd per curiam*, 216 F.2d 749 (6 Cir. 1954), *certiorari denied* 349 U.S. 904 (1955).

"Those cases apply with even greater force to the case at bar, where plaintiffs requested a complete change in RCA's long established selling policy in existence for many years before plaintiffs commenced business in 1957" (R. 1926).

Appellants erroneously assert that *Standard Oil Company of California v. Moore* (9 Cir. 1957) 251 F.2d 188 held that such "independent business reasons" for refusing to deal with a retailer are not sufficient to justify taking the case from the jury (App.Opn.Br., p. 97). In that case, appellant oil companies, *all of whom sold to dealers in the market area*, claimed that each of *their refusals to*

sell to a particular dealer was the result of an independent business decision. This Court held that there was sufficient evidence of concert of action (251 F.2d 205-207) to allow a jury to reject appellants' claims and infer a conspiracy by the companies to "control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers" (251 F.2d 205). There is no such evidence or inference applicable to RCA in the case at bar. On the contrary, RCA merely adhered to its established policy not to sell to *any* retailers in Northern California (Tr. 4545-4546).

Appellants' apparent theory is that anybody who did not sell to them engaged in parallel action and, therefore, conspired against them.⁵ However, RCA's actions in not selling to appellants were not parallel with the other defendants.⁶ Furthermore, parallel action without evidence of some concert of action will not allow an inference of conspiracy (*Theatre Enterprises v. Paramount* (1954) 346 U.S. 537, 541).

⁵This theory perhaps explains why, when appellants commenced suit in August, 1960, they charged that RCA had conspired to refuse to sell to them since 1957. RCA had not even received a request to sell to appellants when the suit was filed (*supra*, p. 5, fn. 4). Even appellants do not claim any request was made prior to July, 1960.

⁶The lower court pointed out:

"Moreover, there is no evidence that RCA engaged in parallel action. Of the defendants, other than the retailer Hale, two distributors (Maytag West Coast and California Electric Supply Company) sold to plaintiffs (Maytag: January 1958 to March 1959); California Electric: May 1957 to September 1958), two manufacturer-distributors never sold to plaintiffs, although requested to do so from 1960 onwards (Frigidaire and GE), and three manufacturers (Borg-Warner, Whirlpool and RCA) never sold directly to retailers in Northern California" (R. 1926).

As this Court held in affirming a directed verdict in *Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. 1963) 322 F.2d 656, certiorari denied (1963) 375 U.S. 922,

“The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * * Like businesses are generally conducted alike and, as the trial judge correctly stated, *similarity in operations lacks probative significance unless present ‘under circumstances which logically suggest joint agreement, as distinguished from individual action’*” (322 F.2d 661; emphasis added).

In *Brown v. Western Massachusetts Theatres, Inc.* (1 Cir. 1961) 288 F.2d 302, the court affirmed a directed verdict for defendant at the close of plaintiff’s case and pointed out:

“Whatever this term [conscious parallelism] means, it must be something more than mutual awareness of similar conduct. This awareness must be an element entering into each party’s decisional process, and the basis for inferring that it did so must be something more substantial than a guess. For everyone to run out of the building when there is a cry of ‘Fire,’ or to stand in a queue at a bus stop, is not conscious parallelism” (288 F.2d 305-306).

To the same effect see *United States v. Standard Oil Company* (7 Cir. 1963) 316 F.2d 884, 890 and *Winchester Theatre Co. v. Paramount Film Distributing Corp.* (1 Cir. 1963) 324 F.2d 652, 653.

Girardi v. Gates Rubber Company Sales Division, Inc. (9 Cir. 1963) 325 F.2d 196 does not support appellants' claim that parallel action, by itself, is sufficient evidence to allow a jury to infer a conspiracy. In that case a conspiracy between a manufacturer and a distributor to eliminate a price-cutting distributor was alleged. The Court held that there was sufficient evidence of complaints by the defendant distributor to the manufacturer concerning the trade practices of the plaintiff distributor to infer concert of action in the subsequent cessation of supply to the plaintiff distributor.

Appellants have not produced any evidence showing concert of action by RCA. RCA's policy of selling to distributors, and not to retailers in Northern California, is not only different from the acts of those defendants who did sell to retailers and not to appellants, but is not a circumstance which "logically suggest[s] joint agreement" to conspire against one particular retailer. On the contrary, it shows that RCA was not even a potential conspirator against appellants and that no jury could reasonably infer that RCA participated in any conspiracy to boycott appellants.

B. RCA was unconcerned with the prices charged by retailers.

There is likewise no basis for the assertion that the furnishing of suggested retail prices by RCA to Meyer constituted evidence of participation in a conspiracy.

The prices suggested by RCA were quite different from the prices suggested by Meyer (Tr. 1242-1245; Exhs. 1947, 1948, 5114, 5116; and see *supra*, p. 5, ftn. 3).

Furthermore, even retailer adherence to a manufacturer's suggested prices would not be sufficient evidence of a conspiracy to violate the antitrust laws (*Klein v. American Luggage Works, Inc.* (3 Cir. 1963) 323 F.2d 787, 791). In the *Klein* case, which appellants do not even attempt to distinguish, the Third Circuit held that "advising" retail prices by a manufacturer was not conspiratorial conduct (323 F.2d 791). It, therefore, reversed a district court finding of a conspiracy to refuse to sell. It is even clearer here that RCA has in no way conspired for, as the court below pointed out,

"It is clear that these [suggested retail prices] were given as suggested guide lines, were not mandatory on the distributors, and that such suggested retail prices as were given to the retailers all came from the distributors and not from the manufacturers" (R. 1921).

Nor is there evidence to support the assertion that cooperative advertising funds were used by RCA to support list prices (App.Opn.Br., p. 123). As appellants point out, local newspapers charge national firms much higher advertising rates than they do local retailers (App.Opn.Br., p. 30), and manufacturers make funds available for local advertisement of the national product. The record shows that Meyer received cooperative advertising funds from RCA based upon the amount of Meyer's purchases and RCA thereafter exercised no control, other than trademark protection (Exh. 99, Tr. 1230, 1334, 4592). The trademark protection consisted of review by an independent advertising agency of claims for cooperative advertising funds to insure proper use of RCA's trademarks

(Exh. 99, pp. 10-13, 28-30).⁷ There was no RCA policy to have advertisements reflect suggested prices (Tr. 4543), and RCA was not concerned if advertisements showed less than suggested prices (Tr. 4606).

In connection with their assertions about advertising, appellants attempt to convey the erroneous impression that the lower court excluded an exhibit which appellants assert showed that RCA required retailers, as a condition to receiving cooperative advertising funds, to make affidavits that they advertised at list prices (App.Opn.Br., p. 74; Appx. A, p. xxii), and that they did not engage in comparative price advertising (App.Opn.Br., p. 108). The excluded letter from RCA concerned misrepresentation in comparative price advertising (Exh. for Ident. 5068). It stemmed from RCA's desire to conform to the policies of the Federal Trade Commission (Exh. for Ident. 5068D).⁸

The Federal Trade Commission Guides Against Deceptive Pricing in effect at that time stated that, where retailers use comparative price advertising, no statement

⁷RCA is necessarily concerned with any improper use of its trademarks which could affect RCA's rights (see, e.g., *King-Seeley Thermos Co. v. Aladdin Industries, Inc.* (2 Cir. 1963) 231 F.2d 577, 578-580; *Bayer Co. v. United Drug Co.* (S.D.N.Y. 1921) 272 Fed. 505, 512; 3 Callman, *Unfair Competition and Trademarks* (2d Ed. 1950) pp. 1338-1340). RCA, therefore, insists on the proper use by distributors and retailers of RCA trademarks in conjunction with the sale and advertisement of products manufactured by RCA (Exh. 88, p. 6; Exh. 99, pp. 10-13). This is in accord with the established practice of manufacturers to avoid damage to their trademarks (see Bayol, *Policing of Trademarks*, United States Trademark Ass'n, *Trademark Management* (2d Ed. 1956), pp. 67-88; Derenberg, *The Problem of Trademark Dilution and the Antidilution Statutes* (1956) 44 Cal.L.Rev. 439, 463-475).

⁸It is irrelevant that a trade association, the EIA, published an advertising booklet based upon these F.T.C. guides (Exh. for Ident. 7; see App.Opn.Br., p. 74). RCA did not belong to NEMA or AHLMA (R. 751-752, 935), mentioned throughout appellants' brief.

representing a saving or reduction in price should be used unless the saving or reduction was from the usual or customary selling price in the trade area or from the advertiser's usual or customary retail price in the regular course of business (23 Federal Register (1958) 7965-7966).

RCA's letter (Exh. for Ident. 5068) stated that, since verification of all comparisons in cooperative advertising could not be made, claims for advertisements containing comparative advertising would not be honored unless accompanied by an affidavit stating that the compared price was a price at which the advertiser actually sold the article in the regular course of business or that the compared price was the usual retail selling price in a specified trade area. The required affidavit made no mention of list or suggested prices or the actual selling price. It dealt only with the compared price. After the Federal Trade Commission changed its Guides Against Deceptive Pricing (29 Federal Register (1964) 178), RCA discontinued the affidavit requirement (Exh. for Ident. 5068D).

C. Meyer was not an agent of RCA; it was an independent distributor of products manufactured by RCA.

RCA did not participate in any conspiracy through the acts of the distributor, Meyer. Meyer was a separate defendant in this action and has settled with appellants. We do not mean to suggest that Meyer violated the anti-trust laws. We point out only that appellants' attempt to hold RCA responsible for the acts of Meyer finds no support in the record and is contrary to law.

Meyer was not the agent of RCA. RCA merely sold television sets to Meyer with full title passing to Meyer (Exh. 88, p. 5; Tr. 1333).

In *Mathews Conveyor Co. v. Palmer-Bee Co.* (6 Cir. 1943) 135 F.2d 73, the Court affirmed dismissal of an action for an accounting on the ground that the defendant, an exclusive distributor for plaintiff, could not be deemed an agent of plaintiff. The Court held:

“* * * the word ‘agency’ is frequently used to indicate that a dealer has the exclusive right to sell a specified article in certain territory; *but such dealer does not thereby represent the manufacturer as agent in the sense in which that relation is understood in the law of principal and agent*, but simply buys from the manufacturer in the regular course of trade and sells the article to the public. Such a transaction is a sale rather than an agency” (135 F.2d 77-78; emphasis added).

In *Standard Fashion Co. v. Magrane Houston Co.* (1 Cir. 1919) 259 Fed. 793, affirmed (1922) 258 U.S. 346, a case involving section 3 of the Clayton Act, the Circuit Court held that defendant, the distributor, was not an agent of plaintiff, the manufacturer, because

“Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff’s goods to the plaintiff’s customers” (259 Fed. 794).

In the words of the District Court in *C.B.S. Business Equipment Corp. v. Underwood Corporation* (S.D.N.Y. 1964) 240 F.Supp. 413, 422, “What is determinative is whether” the distributor “is entitled or enabled to act toward the goods as the real owner.”

D. RCA did not give special or favored treatment to appellants' competitors.

Appellants' assertions that certain retailers, particularly Broadway-Hale, received special treatment from RCA are groundless. For example, there is no support for appellants' references to alleged "special meetings" between Hale and RCA to assist Hale in maintaining a 30 to 40 per cent price margin (App.Opn.Br., pp. 100, 113, 125). The portions of the record upon which appellants rely (Tr. 188-210, 222-224, 231-275; Exhs. 349, 350) show that an incidental part of a trip to New York by some representatives of Hale was to "see what the Whirlpool line looked like" (Tr. 256). At the time of that buying trip (Tr. 563), the Hale representatives mistakenly believed that Whirlpool was a part of RCA (Tr. 258-259).⁹ They spoke with a representative of RCA, who made it clear that RCA and Whirlpool were separate corporations (Tr. 573-575).

Appellants' assertion that RCA gave Hale special treatment in the use of cooperative advertising funds (App. Opn.Br., pp. 31, 39, 100) is a further example of the distortion by which appellants attempt to make a case against RCA. Appellants state: "* * * R.C.A. supplied *additional* advertising funds for *particular* promotions (Tr. 4765-4766, 4792, 4797). Hale received a special authorization, No. 1001, in the amount of \$2,325.00, relating to R.C.A. Victor (Pl. Ex. No. 575)" (App.Opn.Br., p. 39; emphasis by appellants). But appellants fail to point out that such additional advertising funds were merely a type of cooperative advertising funds (Tr. 4558-

⁹RCA licensed the use of its trademark on some of the products manufactured by Whirlpool (Exh. 12155).

4560; Exh. 99, p. 3) administered by the distributor, Meyer. Exhibit for Identification 575 is a Meyer form signed by a Meyer salesman concerning three months of advertising. There is no showing that it was "special" to Hale or that it was submitted to RCA.

There is likewise no evidence to support appellants' groundless implications that RCA had "key market" advertising funds or funds earmarked for a specific retail account (App.Opn.Br., p. 31). The fact that Hale made use of *cooperative* advertising funds furnished to Hale by Meyer (Exh. No. 1846) does not show any special treatment by RCA. RCA contributed to Meyer's cooperative advertising funds with the understanding that Meyer would treat all of Meyer's retail customers on a proportionately equal basis (Exh. 99, p. 2). There is no showing that Hale received a disproportionate share from Meyer. In any event, the fact that those funds were used by Meyer for local advertising in cooperation with retailers, including Hale, does not support an inference that Hale received any special treatment from RCA.

II

THERE WAS NO ERROR IN THE DISTRICT COURT'S PRETRIAL DISCOVERY ORDERS PERTAINING TO RCA.

Pretrial discovery orders are a matter of judicial discretion and will not be overturned unless that discretion is abused.

"An appellate court does not * * * decide whether it would, in the first instance, have permitted the discovery prayed for.

“Granting or denying a request under rule 34 is a matter within the trial court’s discretion and it will be reversed only if the action taken was improvident and affected substantial rights” (*Tiedman v. American Pigment Corporation* (4 Cir. 1958) 253 F.2d 803, 808).

Francisco v. Travelers Insurance Company (8 Cir. 1966) 363 F.2d 1019, 1021;

Jayson v. United States (5 Cir. 1961) 294 F.2d 808, 811.

A. The District Court did not err in its rulings on appellants’ motions for the production of documents concerning RCA.

Appellants erroneously argue that the District Court’s discovery rulings denied them access to documents to which they were entitled (App.Opn.Br., pp. 172-177; Appx. A, pp. 1xii-1xiii). In each of the instances of which appellants complain of rulings involving RCA, the lower court granted the requested discovery, or appellants failed to establish either the existence of the requested documents or the good cause¹⁰ or relevancy necessary for their production.

¹⁰The Supreme Court has recently discussed the good cause requirement:

“This additional requirement of ‘good cause’ was reviewed by Chief Judge Sobeloff in *Guilford National Bank v. Southern R. Co.*, 297 F.2d 921, 924 (C.A. 4th Cir.), in the following words:

* * * * *

“* * * [T]he court must decide as an initial matter, and in every case, whether the motion requesting production of documents or the making of a physical or mental examination adequately demonstrates good cause. The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words

An example of appellants' attempted distortion is their claim (App.Opn.Br., pp. 172-173; Appx. A, p. 1xii) that a motion for an order to show cause why documents should not be produced (R. 323) was improperly denied (R. 413-415). Appellants attempt to convey the erroneous impression that the trial court in its rulings 2(e) and 2(j) (R. 414) improperly "qualified the documents" RCA was to produce (App.Opn.Br., p. 172). Ruling 2(e) granted appellants' requests (R. 324, lines 23-28), except with respect to correspondence which did not exist (R. 379). Likewise, ruling 2(j) denied without prejudice a request (R. 325, lines 18-22) by appellants for RCA reports pertaining to conferences with representatives of any defendant until such time as appellants could develop in depositions a "legal basis for the existence of such conferences to justify the request" (Rep. Tr. of Hearings on Motions for Order to Show Cause Why Documents Should Not be Produced, Apr. 17, 1964, p. 69; R. 414). Appellants have never shown that any of such conferences or documents existed.

Appellants, on June 5, 1964, filed another motion, this time against all "factory defendants" (R. 422) seeking

"... good cause" the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules."

"The courts of appeals in other cases have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. This is obviously true as to the 'in controversy' and 'good cause' requirements of Rule 35. They are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination" (*Schlagenhauf v. Holder* (1964) 379 U.S. 104, 117-118).

production of "[a]ll intra-office reports, memoranda or notes pertaining to or relating to the plaintiffs above named or the retail defendants above named during the above period of time" (R. 425, lines 7-9). In its response (R. 489) RCA pointed out that it "is still searching its files for any documents responsive to this item and has no objection to its being granted" (R. 492, lines 4-6). Furthermore, when appellants subsequently filed an interrogatory asking whether or not statements or reports reflecting conversations having to do with the acquisition, sale or advertising of television sets by appellants or other retail defendants existed (R. 625-626), RCA answered that

"There are no such statements or reports other than confidential communications to and from the defendants' attorneys made after commencement of the action * * *" (R. 646).

The misleading nature of appellants' argument is further shown by the claim (App.Opn.Br., p. 175; Appx. A, p. lxiii) that the court below erred in denying certain requests in another of appellants' motions for production of documents filed November 20, 1964 (R. 745).

Appellants claim they were injured by denial of item 20 of the November 20th motion requesting letters received by defendants from plaintiffs and all intraoffice communications concerning such letters. The court only denied production of the original letters and it denied them only because appellants already had copies (Rep. Tr. of Hearings on Motions, Dec. 30-31, 1964, pp. 234, 174-175, 110). It granted appellants' motion for production of all the intraoffice memoranda concerning the let-

ters and anything written on the original letters (R. 129, 996).

Items 22(c), (d) and (e) of the November 20th motion requested all letters from any officer, agent or representative of RCA to or from Meyer concerning (c) preventing the plaintiffs from acquiring or obtaining RCA television sets from other sources, (d) conversations or statements made by retail dealers concerning prices, other retailers, competition, advertising or promotion of television sets in San Francisco, and (e) sales or possibility of sale to certain specified discount stores (R. 750). RCA objected because appellants again had not shown that any such documents existed (R. 931) and the court denied the motion to produce those items (R. 129, 996; Rep.Tr. of Hearing on Motions, Dec. 31, 1964, p. 234). Appellants have never shown the existence of any such documents.

Item 27(f) of the November 20th motion requested:

“All letters or notes of minutes found in the files of any of your officers, agents or representatives who attended associations composed of two or more manufacturers of household appliances or television sets during the period 1957 to 1964 pertaining to the following, NEMA, EIA, GAMA and AHLMA [with respect to]

* * * * *

“(f) Discount Department Stores or Mass Merchandising Stores” (R. 751-752).

RCA pointed out that it did not belong to NEMA, GAMA, or AHLMA and that no good cause had been shown for requiring RCA to undertake such a search (R. 935). The request was denied (R. 129, 996; Rep. Tr. of Hearing on

Motions, Dec. 31, 1964, p. 236) and appellants still have not established good cause.

B. The District Court did not err in sustaining RCA's objections to certain interrogatories.

Appellants' claim (App.Opn.Br., pp. 174, 176; Appx. A, p. lxiii) that the District Court erred in sustaining certain RCA objections to appellants' interrogatories is also unfounded.

Items 1 and 2 of appellants' interrogatories filed December 7, 1964 (R. 790) asked whether documents existed which reflected conversations in which Manfree and USE were mentioned "expressly or *by implication*" (R. 791-792; emphasis added). The District Court sustained RCA's objection (R. 826, lines 15-23) to the vague portion of the interrogatory which referred to conversations in which USE or Manfree were mentioned "by implication" (R. 972).

Item 3 asked whether documents existed which reflected conversations between defendants and *attorneys* in which Manfree was mentioned (R. 792). The court sustained RCA's objection (R. 826-827) that the interrogatory called for either confidential communications between attorney and client or work product, and that good cause was not shown (R. 972).

Item 6 requested the listing of the documents referred to in items 1 through 5, and the court did not require answers to the extent that it had sustained objections to items 1 through 5 (R. 972).

Appellants' claim (App.Opn.Br., p. 174; Appx. A, p. lxiii) that the court committed prejudicial error in re-

fusing to require (R. 671) defendants to answer appellants' written interrogatories filed September 29, 1964 (R. 625) has no application to RCA. RCA had previously answered those interrogatories, stating that there were no such statements or reports other than confidential communications to and from defendant's attorneys made after commencement of the action (R. 646).

III

THE DISTRICT COURT'S EVIDENTIARY RULINGS CONCERNING RCA WERE CORRECT. THE EXCLUDED TESTIMONY AND EXHIBITS DID NOT, IN ANY EVENT, SHOW THAT RCA PARTICIPATED IN A CONSPIRACY.

In their brief (see particularly App.Opn.Br., pp. 146-151) and in their specification of errors (see particularly App.Opn.Br., Appx. A, pp. xx-xxviii), appellants attack virtually every ruling of the trial court which excluded hearsay or other improper evidence which appellants assert might have connected RCA to the alleged conspiracy.¹¹ For the most part, appellants have ignored the actual reason for exclusion and have laboriously argued

¹¹For example, appellants' attack the rejection of Exhibit for Identification 1691 (App.Opn.Br., Appx. A, pp. xxii-xxiii), a copy of a letter from the president of appellants to RCA dated July 13, 1960, requesting the right to buy RCA products. There was no showing that the letter was ever mailed (Tr. 5984). In any event, RCA never received it (Tr. 4561, 4710). It was thus properly excluded (Tr. 6116) for lack of a proper foundation (*Wagner Tractor, Inc. v. Shields* (8 Cir. July 11, 1967) 381 F.2d 441, 446). A request to sell which was never received can hardly fit appellants' description as "evidence that R.C.A. had directly refused to sell its television sets to appellant Manfree" (App.Opn.Br., Appx. A, pp. xxii-xxiii).

the asserted relevancy of the excluded exhibits or testimony. And in so doing, appellants have resorted to a distorted or misleading characterization of the excluded material.¹² To reply in detail to each of those characterizations would unnecessarily expand this brief, and we shall, therefore, devote most of this portion of the brief to supporting the lower court's rulings on the grounds upon which they were made. By failing to reply in detail, however, to appellants' inaccurate characterizations of the excluded material, we do not acquiesce in appellants' mistaken assertions that the exhibits or testimony would have been relevant or material if they had constituted proper evidence.

Nor do we attempt to deal with all the exhibits which appellants claim were improperly excluded. We deal only with exhibits which appellants assert show conspiratorial conduct by RCA. We do not mean to suggest that the other exhibits indicate conspiratorial conduct by anyone. But even if it be assumed that they did, they do not support

¹²For example, appellants characterize Exhibits for Identification 1165-1169 as indicating that "requests for special promotional allowances for co-conspirator Hale were forwarded to R.C.A. by the distributor and honored by R.C.A., concerning certain in-store promotional expenditures by Hale, stating that the allowance should be made after an 'agreement' had been reached between representatives of Hale and Meyer" (App.Opn.Br., Appx. A, p. xxv).

These exhibits were rejected as hearsay and without foundation (Tr. 4954, 4956, 4959) and appellants make no claim to the contrary. The exhibits consist of Meyer and Hale credit memos between each other. Most of them do not even show that RCA merchandise was involved. None show that the exhibits were forwarded to RCA, that RCA honored the exhibits, or that an allowance would be made after an agreement between representatives of Hale and Meyer.

appellants' assertion that RCA was a party to such conduct.¹³

A. The District Court properly excluded those exhibits which appellants erroneously assert would have shown that RCA enforced its suggested prices upon the distributor.

The exclusions of which appellants complain in this regard (App.Opn.Br., pp. 146-149) were not only proper but the excluded exhibits do not show control by RCA over Meyer, or any "agreement" with Meyer, the independent distributor of television sets manufactured by RCA.

Appellants apparently contend (App.Opn.Br., pp. 146-147) that RCA waived a proper foundation for Exhibit for Identification 343, an RCA intra-company memorandum dated August, 1957 (discussing a suggestion by Meyer that some of RCA's suggested list prices be raised¹⁴), and Exhibit for Identification 344, an RCA intra-company memorandum dated September, 1958 (attaching a distributor's wholesale price list—not a retail price list—for

¹³For example, RCA was not a member of NEMA or AHLMA (R. 751-752, 935). Therefore appellants' assertions that the court improperly excluded exhibits regarding these trade associations (App.Opn.Br., pp. 164-165; Appx. A, pp. li-lvi; Appx. B) are not applicable to RCA.

¹⁴Appellants' assertion (App.Opn.Br., Appx. A, p. xxi) that 343 has a "price list attached, containing pencil notations as to the changes in suggested list prices" is inaccurate. The price list attached was not even an RCA price list. It was a G.E. price list to which had been added some comparative notations in pencil labeled RCA Zone II (RCA's reference to the West Coast). Appellants' claim that 343 refers to discount stores as a "cut price operation" (App.Opn.Br., p. 147) is misleading. The actual language of the RCA memorandum is "I don't see how it [raising suggested list prices] can hurt us in retail establishments that cut prices, such as discount houses, etc., because they will only show a larger price cut" (Exh. for Ident., 343).

a clearance sale). In response to appellants' listing of documents (R. 1533), RCA objected

“* * * to the admission of any such price sheets or correspondence other than price sheets published by RCA or *correspondence emanating from RCA* on the ground that such other price sheets and correspondence is hearsay as to RCA and on the grounds of lack of foundation for its admission” (R. 1518; emphasis added).

Even if it be assumed that this statement might be construed as an admission of authenticity as to the documents not objected to (see App.Opn.Br., p. 147), the statement does not apply to Exhibits for Identification 343 and 344. These exhibits are not correspondence from RCA as appellants apparently assert (App.Opn.Br., p. 147), but are RCA intra-company memoranda, as appellants elsewhere admit (App.Opn.Br., Appx. A, p. xxi).

The exhibits are also irrelevant (see Tr. 4717, 6501-6503). A suggestion by a distributor that the manufacturer raise its suggested retail prices does not support an assertion that the manufacturer enforced its retail prices upon anyone. Moreover, the record shows that Meyer had its own suggested retail prices and that they did not correspond with the suggested prices of RCA (*supra*, pp. 5, fn. 3, and 12).

In this regard, appellants also erroneously claim that the trial court improperly excluded Exhibit for Identification 348, a 1958 letter from an officer of Meyer addressed to an officer of RCA concerning RCA's national advertising of television sets at Zone I (Eastern) prices (App.Opn.Br., p. 148; Appx. A, p. xxi). But this exhibit

was hearsay and without proper foundation (Tr. 4604). The writer of the letter was not identified or available for cross-examination, nor was the recipient called to testify (Tr. 4603-4604). The most that this letter would show is that RCA knew that Meyer disapproved of the national advertising of RCA's Eastern (Zone I) suggested retail prices which were lower than Western (Zone II) suggested prices (Tr. 4540-4541). It does not show that RCA knew of, let alone participated in, any policy by Meyer against price cutting or that RCA took any action regarding the request.

Nor do Exhibits for Identification 5060, 5061 or 5070 (correspondence from RCA to distributors) show that RCA enforced its list prices upon its distributor (see App.Opn.Br., p. 148; Appx. A, p. xxii). Appellants seem to speculate from these exhibits that:

(1) A company contributing funds for local retail advertising of the manufacturer's product is seeking to control the type of advertising done locally (App. Opn.Br., pp. 148-149);

(2) A company seeking to control the type of advertising done locally can also participate in establishing "a local fixed retail market under which its suggested retail list prices are followed and maintained" (App.Opn.Br., pp. 148-149); and

(3) Participation in such a market entails joining with other manufacturers and distributors to boycott retailers advertising below suggested list prices.

These are mere speculations, not reasonable inferences from the excluded exhibits. As shown before, the advertising procedures of RCA have nothing to do with main-

taining or fixing retail prices or the alleged boycott of appellants (*supra*, pp. 12-15, 17-18). Moreover, appellants' speculation is based not on what these exhibits show, but upon appellants' highly inaccurate characterization of them. For example, appellants erroneously state "Ex. No. 5060 consists of a written instruction from R.C.A. to all of its distributors dated February 2, 1959, requiring them to base their advertising allowances to retailers upon list prices; and discontinuing the requirement that the distributors had to match the factory's funds for dealer advertising" (App.Opn.Br., Appx. A, p. xxii). There is no mention in the exhibit of requiring advertising allowances to dealers to be based on list prices. The exhibit only reflects a change in billing procedure (see Tr. 4554-4555).¹⁵

Likewise, Exhibit for Identification 5061 does not list local dealers to benefit by an RCA advertisement as appellants apparently would have this Court believe (App.Opn.Br., Appx. A, p. xxii), but requests the distributor to list the names of RCA dealers who wish to be placed in an RCA promotional advertisement.

And, contrary to appellants' assertion (App.Opn.Br., Appx. A, p. xxii), Exhibit for Identification 5070 does not indicate that there was any requirement of prior RCA approval for the payment by distributors of advertising money to retailers.¹⁶

¹⁵The exhibit stated that because of recent Internal Revenue Service regulations, RCA would discontinue billing distributors for their share of cooperative advertising funds, and would instead give distributors credit for their share.

¹⁶Exhibit for Identification 5070, which consists of four letters, was offered by appellants in connection with an inquiry concerning RCA approval of distributors' promotional activities involving dealer prizes, and was properly excluded as irrelevant (Tr. 4812-4813).

Appellants claim that Exhibit for Identification 5068 is of "special importance" (App.Opn.Br., p. 148) on the erroneous theory that it required dealers participating in cooperative advertising funds to verify "what prices they were showing on their RCA product advertising" (App. Opn.Br., Appx. A, p. xxii). As shown before (*supra*, pp. 14-15), the retailer was only required to show that he had not violated the Federal Trade Commission guides with respect to comparative price advertisements in effect at that time.¹⁷

There is no basis for the appellants' assertions that the court erred in excluding appellants' tabulations (Exh. for Ident. 5064) allegedly showing that Meyer followed RCA's list prices (App.Opn.Br., p. 166; Appx. A, p. 1vi). Appellants withdrew the offer of that exhibit (Tr. 6590) after RCA objected that the exhibit was cumulative (Tr. 6589).

B. The District Court properly excluded those exhibits and testimony which appellants erroneously assert would have shown that RCA maintained a territorial distribution system.

Appellants' objection to the exclusion (Tr. 4415; 4489-4490) of deposition testimony by Mr. A. H. Meyer concerning RCA Victor Distributing Corporation of Los Angeles, a subsidiary of RCA which distributed television sets to retailers in Southern California (Meyer Dep., p.

¹⁷Appellants' further claim (App.Opn.Br., p. 148) that Exhibit 5068 "bears on" deposition testimony of Mr. Saxon that RCA did not engage in retail price competition is curious. That portion of Mr. Saxon's deposition testimony was excluded because the questions advanced during that portion of his deposition were unintelligible and the witness was confused (Tr. 4522-4523). Moreover, Exhibit 5068 has nothing to do with retail price competition, but deals only with deceptive comparative price advertising.

10, lines 15-22; pp. 15-17), is based upon the unfounded assertion that the testimony would have supported a claim that the maintenance of territorial agreements was part of an alleged conspiracy to boycott appellants (App.Opn.Br., pp. 149, 163; Appx. A, pp. xxiii-xxiv). Appellants seek to support these assertions with a misleading characterization of Mr. Meyer's excluded testimony (App.Opn.Br., Appx. A, pp. xxiii-xxiv). Mr. Meyer did not testify that the RCA subsidiary had "exclusive distribution rights in the counties south of the Tehachapis; or Southern California" (App.Opn.Br., Appx. A, p. xxiv). He testified as follows:

"Mr. Keith: Q. Now who took over the distribution of the R.C.A. products in the Los Angeles area, Mr. Meyer, do you know?

"A. The R.C.A. Victor Distributing Company which is a wholly owned subsidiary of the Radio Corporation.

"Q. Now, could you tell us what the territory would be, the Los Angeles territory?

"A. It was the five counties south of the Tehachapis. I think it's five. Southern California" (Meyer Dep., p. 10, lines 15-22).

Appellants' counsel waived (Tr. 4489) reading the remainder of the testimony concerning RCA Victor Distributing Corporation of Los Angeles (Meyer Dep., pp. 15-17) which appellants now claim was improperly excluded (App.Opn.Br., Appx. A, pp. xxiii-xxiv). This testimony was that Mr. Meyer objected to RCA Victor Distributing Corporation's selling to people who had headquarters in Los Angeles but retailed in the northern part of the State. It does not support appellants'

claim "that Meyer and R.C.A.-Victor Distributing Corporation of Los Angeles agreed to a territorial division for R.C.A. product distribution in California; and that the latter refused to sell television sets to Manfree in respecting this exclusive territorial arrangement" (App.Opn.Br., Appx. A, p. xxiii).

Exhibit for Identification 1702 is a statement of business policy by RCA Victor Distributing Corporation in response to appellants' charge of discrimination in favor of White Front discount stores. The letter states:

"The Los Angeles Branch of the RCA Victor Distributing Corp. does not sell household appliances or television sets to the White Front Stores in Oakland or San Jose, California. We concentrate our sales efforts in the market areas where we are best facilitated to serve which are in Southern California. We do not understand how we could possibly discriminate against your organization in any way since we have no customers in your market area."

There is no basis for appellants' assertion that this is a refusal to sell to appellants "allegedly based on territorial distribution agreements" (App.Opn.Br., p. 163). There is no showing that RCA Victor Distributing Corporation consulted with Meyer about this request or that the letter is anything other than a statement of business judgment by RCA Victor Distributing Corporation of Los Angeles to concentrate its sales of television sets in Southern California.

The cases cited by appellants in this regard (App.Opn.Br., p. 163) do not apply to this situation. *U.S. v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365 and *White Motor*

Co. v. United States (1963) 372 U.S. 253 deal with the question of whether territorial restraints imposed upon distributors by the manufacturer are violative of the anti-trust laws. There is no showing of any restraints, imposed by the manufacturer or otherwise, in this case. And *Girardi v. Gates Rubber Company Sales Division, Inc.* (9 Cir. 1963) 325 F.2d 196 and *Walker Distributing Co. v. Lucky Lager Brewing Co.* (9 Cir. 1963) 323 F.2d 1 deal with concerted action among a manufacturer and distributors to eliminate a specific distributor, not territorial agreements.

C. The District Court properly excluded those exhibits which appellants erroneously assert would have shown that RCA had direct knowledge and contact with certain "favored" retailers.

Contrary to appellants' assertions (App.Opn.Br., pp. 149, 159), Exhibits for Identification 780 and 1159, concerning cooperative advertising claims, were properly excluded as irrelevant (Tr. 4649-4650). Exhibit No. 780 is a letter from Meyer, addressed to RCA, noting that some claims for cooperative advertising funds had been rejected by the independent checking agency because the advertisements violated Federal Trade Commission rulings regarding the number of square inches of viewable picture. The letter requested that claims be honored and stated:

"We have made personal calls on both of these offending accounts stressing the necessity of their adhering to those rulings set forth by the Federal Trade Commission insofar as listing the number of viewable surface inches of picture tubes whenever the designation '21 inch' is used. We have also gone over the bulletin we sent to the trade on Sept. 16 regarding this ruling."

Exhibit for Identification 1159 is the RCA response noting that, because of the remedial action which had been taken, the credit claims would be approved. The most that these exhibits show is that Meyer, a distributor selling directly to retailers, supported their claims for cooperative advertising funds and that RCA's interest was in maintaining compliance with FTC rulings. The exhibits do not show that such treatment was limited to any particular RCA retailers.¹⁸

Exhibits for Identification 363, 364 and 365 consist of correspondence from persons other than RCA requesting that RCA's service division (which repairs television sets manufactured by RCA) retain its membership in the San Francisco Better Business Bureau. They were properly excluded as hearsay and irrelevant (Tr. 4747). The most that these exhibits would show is the service division's natural interest in the problems of fraudulent practices of others who repair television sets. The exhibits have no bearing on an alleged conspiracy to boycott appellants and do not, as appellants claim (App.Opn.Br., p. 149), show any RCA concern with local retail market conditions.

¹⁸Exhibits for Identification Nos. 1165-1169 (discussed *supra*, p. 25, fn. 12) are also relied upon by appellants to show special treatment by RCA to Hale (App.Opn.Br., p. 159). These exhibits not only fail to show such special treatment, but were hearsay and without foundation (Tr. 4954, 4956, 4959) and appellants make no claim to the contrary.

D. The District Court properly excluded those exhibits and testimony involving a mail order firm's advertisement which appellants erroneously assert would have shown a plan by RCA to boycott persons who advertised at less than suggested prices.

Appellants complain (App.Opn.Br., pp. 149-151) of the exclusion of deposition testimony (Meyer Dep., pp. 20-23, pp. 24-25; p. 26, lines 14-15; pp. 27-30; p. 31, lines 2-17; p. 32, line 4, to p. 33, line 23; Maag Dep., pp. 89-91, 92, 93-95) pertaining to Exhibit for Identification 784. The exhibit is a July 19, 1958 letter from an employee of Meyer forwarding to RCA a copy of a newspaper advertisement by Spiegel, a mail order catalog house with a San Francisco outlet store, and requesting RCA to look into a possible "spite situation."¹⁹

The excluded testimony of Mr. Meyer shows that the cause of concern was that Spiegel was probably retailing merchandise below Meyer's cost (Meyer Dep., p. 31). He also testified that a letter informing RCA of the situation was the only action that could be taken, and he recognized that RCA would probably not even reply to that letter (Meyer Dep., p. 31).

The excluded deposition testimony of Mr. Maag was that he received Exhibit for Identification 784 and that some retail stores in San Francisco were upset by the Spiegel advertisement (Maag Dep., pp. 90-93).

¹⁹The advertisement in question, which appeared in the San Francisco Call Bulletin of July 17, 1958, advertised an RCA television "regularly \$219.95" for \$148. This was below the price (\$160.57) that Meyer *charged retailers* for the same model (Exh. 1963B).

Exhibit for Identification 783 is a letter from Spiegel outlet stores to Harry Glensor, an attorney for *Meyer*, stating:

“In answer to your [Meyer’s] letter of July 10, 1957 directed to the Spiegel Outlet Store. It is my understanding that the RCA Appliances are not Fair Traded.

“Can you supply me with the forms stating what items are Fair Traded and at what Prices?”

There is simply no basis for appellants’ intimation that this letter (which preceded Meyer’s letter to RCA by a year) was in response to any protest *by RCA* that Spiegel “cease selling RCA products below suggested list prices” (App.Opn.Br., Appx. A, p. xxv).

None of this material concerning Spiegel shows that RCA participated in any plan to maintain retail prices in San Francisco or that RCA took any action in response to Meyer’s concern. The most the excluded material shows is the natural concern by Meyer, the distributor, about a retail advertisement of a product below the price it charged retailers.

E. The District Court properly ruled that RCA field sales representatives were not “managing agents” of RCA.

Appellants also fail to support their assertion that the court erred in ruling that certain RCA field sales representatives were “managing agents” of RCA within the meaning of the Federal Rules (App.Opn.Br., pp. 169, 173). The record shows that an RCA field sales representative does not have any managerial responsibilities (Tr. 4757-4760). And the cases relied upon by appellants (App.Opn.Br., p. 173) are not contrary to the court’s ruling. *Gibbs v.*

RCA Victor Distributing Corporation (W.D.Mo. 1963) 214 F.Supp. 52 held that the duties of employees of a foreign corporation as outlined in an affidavit were sufficiently broad to make him a general agent for the service of process under a civil procedure rule of Missouri. The court did not discuss the duties of the employee. *Newark Insurance Company v. Sartain* (N.D.Cal. 1957) 20 F.R.D. 583 held that an insurance agent who was held out to have broad powers concerning the issuance of insurance, the collection of premiums and the payment of claims was a "managing agent." RCA field sales representatives do not have such broad discretionary powers.

F. Since there is no evidence that RCA was a party to a conspiracy, declarations of employees of alleged "co-conspirators" were not admissible against RCA.

Appellants contend that certain excluded declarations were admissible against one defendant, and therefore should have been admissible against all defendants, including RCA (App.Opn.Br., p. 138). For example, appellants assert that the hearsay conclusory declaration attributed by appellants' president, Mr. Freeman, to Joseph Valenson if properly admissible against one defendant is also admissible against RCA (App.Opn.Br., p. 138). The asserted declaration contains no reference to RCA. The declaration was not admissible against RCA on a conspiracy theory because appellants have not shown that RCA was a party to any conspiracy.

Schine Theaters v. United States (1948) 334 U.S. 110, the case appellants rely upon (App.Opn.Br., p. 138), admitted "numerous interoffice communications" against all defendants only after a conspiracy between Schine and

those defendants was established by independent evidence (334 U.S. 116-117).

Similarly, this Court held in *Standard Oil Company of California v. Moore* (9 Cir. 1957) 251 F.2d 188, certiorari denied (1958) 356 U.S. 975, that such statements "are not to be considered as against other alleged members, unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy" (251 F.2d 210).

In *Flintkote Company v. Lysfjord* (9 Cir. 1957) 246 F.2d 368, certiorari denied (1957) 355 U.S. 835, this Court held that statements made by a co-conspirator during the existence of the conspiracy and in execution of common design were admissible against all conspirators "if plaintiff had made a prima facie showing that there was a conspiracy and that Flintkote had joined the conspiracy" (246 F.2d 386). There has been no such showing in this case. Therefore, any declarations admitted or admissible against one defendant are not thereby admissible against RCA.

IV

THERE WAS NO ERROR IN THE DISTRICT COURT'S PRETRIAL ORDER OF AUGUST 13, 1965, WHICH DELINEATED THE ISSUES TO BE TRIED AND SEPARATED THE ISSUE OF LIABILITY FROM THAT OF DAMAGES.

Appellants attack the District Court's pretrial conference order of August 13, 1965 (R. 1608-1609) on two grounds: (1) that the court limited the issues to be tried to a "horizontal" conspiracy (App.Opn.Br., pp. 130-133);

(2) that the order separated the issue of liability from that of damages (App.Opn.Br., pp. 133-135).

The first ground is based upon a misconstruction of the order. There was no error with respect to the second ground. In any event, appellants could not have been prejudiced on either ground.

A. The District Court did not err in delineating the ultimate issues concerning liability.

Appellants erroneously claim that the trial court's pre-trial order "limited the issues to be tried *solely* to a horizontal conspiracy to boycott the plaintiffs" (App.Opn.Br., pp. 130-131; emphasis by appellants). The order provides:

"The ultimate issues to be tried in these actions on the issue of liability are as follows:

"a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?

"b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?" (R. 1609).

If appellants' interpretation of the pretrial order were correct, appellants could not have been prejudiced in their attempt to make a case against RCA. Appellants assert they were precluded from introducing evidence of a "ver-

tical'' conspiracy between RCA, Meyer and Hale to maintain and fix retail prices and to boycott appellants (App. Opn.Br., p. 131). Prior to the pretrial order in question (R. 1609), appellants filed an offer of proof stating the evidence relied upon to prove this asserted vertical conspiracy (R. 1481). None of the evidence mentioned in appellants' offer of proof was excluded at the trial on the basis of the pretrial order.²⁰ As heretofore shown, appellants have not produced any evidence which would allow a jury to infer that RCA conspired with anyone—horizontally, vertically or otherwise.

As the District Court pointed out,

“* * * The record is devoid of any evidence of an agreement between RCA and anyone to combine or conspire in the manner charged or in any other manner. Nor is there any evidence from which a jury could reasonably infer the existence of such an agreement or combination” (R. 1925).

B. The District Court did not abuse its discretion by trying the issue of liability prior to the issue of damages.

The pretrial order of August 13, 1965, provides that

“These issues which relate to liability shall be tried and determined by way of special verdict before the issue of damages is tried before the same jury” (R. 1609).

A separation of the issue of liability from that of damages is a matter for the judge's discretion under Rule

²⁰Much of the evidence was admitted; of the evidence excluded, most was excluded as hearsay, for lack of foundation, or for other reasons unrelated to the pretrial order. See, for example, discussion of Exhibits for Identification Nos. 343 and 344 (*supra*, pp. 26-27) relied upon by appellants in this regard (R. 1484).

42(b) of the Federal Rules of Civil Procedure (*Richmond v. Weiner* (9 Cir. 1965) 353 F.2d 41, 44; *Moss v. Associated Transport, Inc.* (6 Cir. 1965) 344 F.2d 23, 25).

The separation of the issues did not preclude appellants from producing any evidence relevant to proving a conspiracy, and they do not claim that any such evidence was improperly excluded because of the separation.

Not only is evidence of the extent of damages generally irrelevant to prove a conspiracy, but such evidence could not possibly have shown that RCA was a party to any alleged conspiracy.

This is not a case such as *United Air Lines, Inc. v. Wiener* (9 Cir. 1961) 286 F.2d 302 cited by appellants (App.Opn.Br., p. 135). In that case, the Court held that the issues of liability and damages could not be tried to *separate juries* because plaintiffs were suing for exemplary damages based upon the degree of culpability. Exemplary damages are not sought in this case and, in any event, the issues in the case at bar were to be tried by the same jury.

Haverhill Gazette Company v. Union Leader Corporation (1 Cir. 1964) 333 F.2d 798, also cited by appellants (App.Opn.Br., p. 134), has nothing to do with the present situation. The *Haverhill* case held that a master's finding of damages was inconsistent with the trial court's finding of liability.

V

**THERE WAS NO ERROR IN THE DISTRICT COURT'S
TAXATION OF COSTS TO RCA.**

Appellants claim that the trial court erred in taxing for the benefit of the ten defendants the costs of one copy of the transcript of the pretrial proceedings and two of the five copies of the trial transcript which they shared at the trial (App.Opn.Br., p. 177). The court below ruled that it was necessary for the ten defendants to have two copies of the trial transcript "in view of the complicated nature of the case" (Tr. 6921). As this Court held in *Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. 1963) 322 F.2d 656, 677-678, the need of counsel for a "complete, accurate, and readily available record of all these proceedings, both those during and before the actual trial, is readily apparent" (322 F.2d 678).

Appellants erroneously assert that the court below "taxed the costs for one copy of every deposition taken by appellants, and by appellees" (App.Opn.Br., p. 177). The court below disallowed many depositions (see, e.g., Tr. 6942-6943, 6963-6965, 6974-6975, 7019), and there was no error in its rulings with respect to the other depositions. The court below properly allowed appellees one copy of depositions taken by appellants of officers of parties to the litigation (Tr. 7004-7006), and one copy of depositions taken by appellants or appellees of witnesses who testified at the trial. These costs are in strict accord with the views expressed by this Court in the *Independent Iron Works* case, since those depositions might be used for impeachment (322 F.2d 678). The court

also allowed the cost of depositions taken by appellants which were used at the trial, because of the complexity of designations and the difficulty of reading the depositions into the record (see Tr. 6937-6941).

The court properly taxed reproduction of one copy of the exhibits for use by all of the defendants (Tr. 6924). The court ruled that "problems in connection with the exhibits," in particular, appellants' manner of using the exhibits throughout the trial, made it necessary for defendants to share a copy of the exhibits (Tr. 6924). Appellants have not shown that this cost was an abuse of discretion.

Appellants also claim (App.Opn.Br., p. 181) that the District Court improperly taxed the expenses of a deposition witness who traveled more than 100 miles for the purpose of having his deposition taken. Appellants apparently fail to note that, in the very case they cite, *Farmer v. Arabian American Oil Co.* (1964) 379 U.S. 227 (App. Opn.Br., p. 181), the Court recognized that a Federal District Court could, in an appropriate case, tax expenses for transporting witnesses more than 100 miles (379 U.S. 232). And this Court, in *Moylan v. AMF Overseas Corporation* (9 Cir. 1965) 354 F.2d 825, 829, held that travel expenses beyond the 100-mile subpoena provision were proper items for taxation against a losing party. In this case, the deposition witness was president of RCA Sales Corporation, a necessary and material witness. The court found that the appellants' taking of the deposition of this witness in San Francisco served appellants' convenience (Tr. 6980) and allowed the expenses (Tr. 6985). This was not an abuse of the court's discretion.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the judgment in favor of RCA.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Radio Corporation of America.

No. 20770

In the
United States Court of Appeals
For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation;
RADIO CORPORATION OF AMERICA, a Delaware corporation;
WHIRLPOOL CORPORATION, a Delaware corporation;
MAYTAG COMPANY, a Delaware corporation;
MAYTAG WEST COAST COMPANY, a California corporation;
GENERAL MOTORS CORPORATION, a Delaware corporation;
FRIGIDAIRE SALES CORPORATION, a Delaware corporation;
NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

**Opening Brief of Appellees Borg-Warner
Corporation and Norge Sales Corporation**

On Appeal from the United States District Court
for the Northern District of California

FILED

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No. 20770

In the

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation;
RADIO CORPORATION OF AMERICA, a Delaware corporation;
WHIRLPOOL CORPORATION, a Delaware corporation;
MAYTAG COMPANY, a Delaware corporation;
MAYTAG WEST COAST COMPANY, a California corporation;
GENERAL MOTORS CORPORATION, a Delaware corporation;
FRIGIDAIRE SALES CORPORATION, a Delaware corporation;
NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

Opening Brief of Appellees Borg-Warner Corporation and Norge Sales Corporation

On Appeal from the United States District Court
for the Northern District of California

I.

INTRODUCTION

The present appeal is from the Judgment on Directed Verdict and Order Dismissing Complaints entered by the United States District Court for the Northern District of California on Novem-

ber 24, 1965 in Civil Actions Nos. 39336 and 42674.¹ Pursuant to said judgment appellee Borg-Warner Corporation was dismissed as a defendant, its motion for a directed verdict having theretofore been granted (R. 1977-1978).² All other appellees, *except Norge Sales Corporation*,³ likewise made motions for directed verdicts which were granted. The judgment entered on November 26, 1965 does not mention Norge Sales, nor does it purport to determine that corporation's liability to appellants in any way.⁴ The situation with respect to Norge Sales is explained and discussed in the following section of this brief.

This brief deals only with the facts, law, rulings, and alleged errors of the proceedings in trial court which relate to appellees Borg-Warner and Norge Sales. No attempt has been made to discuss the many points of claimed error set forth in Appellants' Specification of Errors and Opening Brief which do not directly involve these appellees. Matters relating to the W. J. Lancaster Co. (an alleged co-conspirator) are also discussed whenever Norge products are involved. (Lancaster was the independent distributor of Norge products in northern California during the relevant period of time.) To the greatest extent possible, consistent with protection and preservation of the rights of appellees Borg-Warner and Norge Sales, duplication of points made in the briefs filed by other appellees is avoided. Where matters claimed to be prejudicial error are common to *all* appellees, Borg-Warner and

1. Both actions were consolidated for trial pursuant to the Further Pretrial Order filed in said actions on August 13, 1965 (R. 1608-1609).

2. For convenience of reference, abbreviations in this brief with respect to the Reporter's Transcript, Clerk's Transcript and Exhibits are the same as used by appellants. Thus, the reporter's transcript is "Tr."; clerk's transcript is "R"; Plaintiff's Exhibits in evidence are "Pl.Ex.No."; plaintiffs' Exhibits marked for identification but not in evidence are Pl.Ex.for Id.No."; Transcript of pretrial hearings are "P.Tr."; reference to appellants' opening brief is designated "Br."; and the Specification of Errors is "Sp. of Err."

3. Hereinafter, Borg-Warner Corporation will be referred to as "Borg-Warner", and Norge Sales Corporation will be referred to as "Norge Sales".

4. Subsequent to the hearing on taxation of costs, an additional page was added to the judgment of November 26, 1965 (R. 1979). This page is a listing of costs allowed the various defendants showing Norge Sales was allowed \$20.00.

Norge Sales hereby refer to, and incorporate the authorities and arguments presented in the briefs of other appellees.

Thus, the following numbered Specifications of Error are not discussed herein because thoroughly discredited and disposed of by the briefs of other appellees herein:

- II (Order requiring separate verdict on issue of liability before trial on issue of damages);
- III (Pretrial order delineating issues to be tried);
- IX (Taxation of Costs).

Numerous specifications of error are asserted by appellants which do not pertain to Borg-Warner or Norge Sales. No attempt has been made to reply to such alleged errors. Specifications of Error VI and VII and subdivisions thereof fall within this category.

Other specifications of error only partially relate to or involve Borg-Warner or Norge Sales. In such instances only such portions of the alleged errors as apply to these appellees are discussed. (e.g. Exclusion of Evidence, Exclusion of portions of Alpine Deposition, Discovery orders, Sp. of Err. V A-I, and VIII A-G.)

II.

STATEMENT OF JURISDICTION

A. As to All Appellees Except Norge Sales.

This court has jurisdiction of the present appeal with respect to all appellees except Norge Sales, pursuant to 28 U.S.C., §§ 1291 and 1294(1).

B. As to Norge Sales, This Court Lacks Jurisdiction of the Appeal, Because a Timely Notice of Appeal From the Summary Judgment in Favor of Norge Sales Was Not Filed.

This court may always consider the question of its jurisdiction of an appeal, even though the question is not raised by a special motion to dismiss the appeal. *Tomlinson v. Poller*, 220 F.2d 308 (5th Cir. 1955), *cert. denied*, 350 U.S. 832 (1955); *Budke v. Kaiser-Frazer Company of Alaska*, 275 F.2d 217 (9th Cir. 1960). The court may dismiss an appeal for want of jurisdiction upon its own motion. 36 C.J.S. *Federal Courts*, § 296(20).

Norge Sales,⁵ not named as a defendant in action No. 39336, was dismissed as a defendant in action No. 42674 pursuant to a summary judgment entered by the trial court on June 14, 1965, upon the grounds that said action was barred as to Norge Sales by the applicable Statute of Limitations (R. 165-166).

The partial summary judgment in favor of Norge Sales contained no express determination that there was no just reason for delay, and no express direction for entry of judgment. Therefore, under Rule 54(b) F.R.Civ.P. the judgment was subject to modification or revision at any time prior to the entry of judgment on directed verdict entered on November 26, 1965. Accordingly, appellants could not appeal from this summary judgment in favor of Norge Sales prior to the final judgment determining all the claims of all parties. *Miles v. City of Chandler*, 297 F.2d 690 (9th Cir. 1961). However, when appellants did appeal from the final judgment, they had the obligation of expressly noticing an appeal from the summary judgment dismissing Norge Sales, if they wished to make said defendant an appellee (F.R.Civ.P. 73(b))⁶ This appellants did not do.

Thus, the notice of appeal filed herein on December 1, 1965 states in full as follows: "Notice is hereby given that plaintiffs, UNITED SHOPPERS EXCLUSIVE and MANFREE, INC. hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 26, 1965."

5. At all times material to this appeal Norge Sales was a subsidiary of Borg-Warner. Said company was organized under the laws of Indiana in December, 1954 and originally until about January 1, 1960, about eighty percent (80%) of its stock was owned by Borg-Warner and the remaining twenty percent (20%) by Judson Sayre and Associates. Commencing about January 1, 1960 Borg-Warner owned one hundred percent (100%) of the stock of Norge Sales and four out of five of the directors of Norge Sales have likewise been directors of the parent company, Borg-Warner, the remaining directors being Mr. Sayre and his successors (Tr. 2489-2491, B-W Ex.No. 9001).

6. Rule 73(b) of Federal Rules of Civil Procedure provides in pertinent part that the notice of appeal "shall designate the judgment or part thereof appealed from . . ." The notice of appeal filed by appellants designates only the judgment on directed verdict as the judgment from which appellants appeal. The separate judgment dismissing Norge Sales which was entered on June 14, 1965 is not appealed. No notice of appeal from said judgment has ever been filed.

(R. 2048) Said final judgment on directed verdict expressly deals only with those defendants who moved for direct verdicts. Obviously, Norge Sales was not such a defendant.

The effect of Rule 54(b) is to establish the period of time within which a notice of appeal from a partial summary judgment may be filed. Here that period commenced to run on the date of entry of the Judgment on Directed Verdict, November 26, 1965. It is submitted that Rule 54(b) cannot be used by appellants as an excuse for failure to file a timely notice of appeal from the summary judgment in favor of Norge Sales.

It is well settled that the timely filing of a notice of appeal is jurisdictional. *Napier v. Delaware, Lackawanna & Western Railroad Company*, 223 F.2d 28 (2d Cir. 1955); *Knowles v. United States*, 260 F.2d 852 (5th Cir. 1958). Since no notice of appeal from the summary judgment in favor of Norge Sales was filed within the time allowed by the Rules, it is respectfully submitted that this court lacks jurisdiction over any appeal from said summary judgment.

III.

STATEMENT OF THE CASE

A. The Issues.

Two complaints were filed by appellants, the first on August 12, 1960; and the second on August 4, 1964. Both contain substantially the same allegations, the second complaint simply dropping several of the original defendants, and adding several new defendants, among which was Norge Sales.⁷ Essentially the second complaint is a supplemental complaint alleging the same anti-trust conspiracy and seeking additional damages covering a four-year period of time subsequent to the filing of the first complaint.

The complaints in both actions allege violations of the Sherman Act, 15 U.S.C., §§ 1 and 2. Appellees and alleged co-con-

7. Those defendants named in the first complaint but not the second were Westinghouse Electric Supply Co., Sylvania Electric Products, Inc., and Frank H. Edwards Company. The new defendants named in the second complaint were Norge Sales Corporation, Callectron and Zenith Sales Corporation (R.1, 15).

spirators are charged with having restrained and monopolized interstate trade by 1) contracting, combining, conspiring and agreeing to restrain and monopolize interstate trade and commerce in the distribution and sale in San Francisco of television receiving sets and major household appliances such as washers, ranges, and refrigerators, 2) having performed a wide range of acts pursuant to and in furtherance of such a conspiracy, and 3) having prevented appellants, Manfree, Inc. (hereinafter Manfree) and United Shoppers Exclusive (hereinafter U.S.E.) from obtaining the television sets or major appliances manufactured by appellees and alleged co-conspirator manufacturers. Appellants alleged damages in the total sum of \$1,500,000.00 and prayed that said amount be trebled pursuant to 15 U.S.C., § 15, and further prayed for injunctive relief.

The trial court made its "Further Pretrial Order" on August 13, 1965 (R. 1608-1609). This order set forth the ultimate issues to be tried in both actions as follows:

"a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?

"b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

These issues are precisely those raised by appellants in both of their complaints. Contrary to appellants' statement (Br. p. 14), the trial court did not limit the issues to be tried to a "horizontal conspiracy" as that term is commonly understood in antitrust law. Thus, appellants were not restricted to showing agreement between competitors on the same functional level of competition.

The Memorandum Opinion of the trial court reflects the careful scrutiny given to all the evidence produced by appellants with respect to the above issues without regard to whether such evidence involved manufacturers, or distributors, or retailers, or a

combination of these different levels of competition (R. 1912-1976).⁸

B. The Plaintiffs.

The plaintiffs (appellants herein) in these actions are U.S.E., a so-called discount department store located on Alemany Boulevard in San Francisco, California; and Manfree, a corporate lessee of space in the U.S.E. building which operates the major appliance and television concession.

The U.S.E. store opened for business on March 7, 1957, and the major appliance concession was then operated by a company called United Appliance Company. Among other products sold by this concession was the Norge brand of home appliances (Tr. 5705, 5711). United Appliance Company continued to operate as the major appliance concessionaire of U.S.E. for approximately two months. In May, 1957, Manfree was organized to take over the operations of United Appliance Company when the latter firm encountered financial difficulties (Tr. 5708, 5712 and 5995). U.S.E. itself has never purchased any major appliances or television sets (Tr. 5994).

U.S.E. commenced operations as a "closed door" discount house, that is, purchasers were required to be "members". To qualify for membership two requirements had to be met. First, the applicant had to be a person within certain specified groups, to wit, veterans, government employees, or union members. Second, payment of a \$2.00 fee was required.⁹ Membership cards were not supposed to be loaned to non-member persons outside of the member's family (Tr. 5997, 6190, 6201-6206).

Throughout the applicable time period, 1957-1964, the number of concession lessees at U.S.E. ranged from twelve to fifteen cov-

8. For example, note the trial court's analysis of the evidence with respect to the relationship between R.C.A. and the local distributor of R.C.A. products (R. 1923-1925), and that between Frigidaire Sales Corporation and the alleged co-conspirator retailers (R. 1947-1948).

9. The restricted membership feature of U.S.E. continued until January, 1960. Membership then became open to anyone upon payment of the \$2.00 fee. In September, 1961, "membership" was dispensed with entirely and U.S.E. has since been an "open door" discount store (Tr. 5999-6000, 6201-6202).

ering a variety of merchandise (Tr. 5993). Manfree, as one of these lessees, occupied a small amount of floor space within the U.S.E. building.¹⁰

C. The Defendants.

1. GENERALLY.

The complaint in action No. 39336 originally listed numerous defendants on all levels of distribution. These included eleven national manufacturers of major home appliances and television sets, including appellee Borg-Warner; nine wholesale distributors of such products, some being subsidiaries of manufacturers such as Maytag West Coast and Frigidaire Sales Corporation, and some being totally independent companies as the Meyberg Company, California Electric Supply, and W. J. Lancaster Co.,¹¹ and five retail stores in San Francisco (R. 1). Defendants dismissed before trial were thereafter referred to as alleged co-conspirators.

2. BORG-WARNER AND NORGE SALES.

Borg-Warner, at all times material to this litigation, was an Illinois corporation which manufactured Norge brand major appliances. The manufacturing division of Borg-Warner responsible for these operations was designated the "Norge Division". This was an operational division and not a separate company (Tr. 2493-2494). Judson Sayre was "chief executive officer" of this division of Borg-Warner and at the same time was president of Norge Sales. However, he was not a corporate officer of Borg-Warner (Tr. 2501-2503).

Borg-Warner manufactured variations of Norge appliances. These models were referred to by various names such as "MP models" or "Key Account Models" or "Deviation Models" (Tr. 2700, 2960). Borg-Warner sold its entire output of Norge appliances, including any special models, to Norge Sales (Pl. Ex. No.

10. At the start of its operation, Manfree occupied approximately 1400 square feet of floor space and subsequently increased that space to approximately 2000-2200 square feet (Tr. 5984-5985).

11. W. J. Lancaster Co. will hereinafter be referred to as "Lancaster." This is not to be confused with the individual, Mr. William J. Lancaster, the president of the company, who will be referred to as "W. J. Lancaster."

1775). The special or deviation models might be stripped down versions of other Norge models, such as machines with less chrome (Tr. 836-837). Neither Borg-Warner nor Norge Sales were shown to have any policies concerning what use could be made of such models by the distributors of Norge products. They were, in fact, used by distributors as promotional items to build interest in Norge products by new and old accounts alike (Tr. 2700; Pl. Ex. No. 4089).

Though Norge Sales was not named as a defendant in Action No. 39336, it was subsequently made a defendant in Action No. 42674. Appellants alleged that Norge Sales was an agent and affiliate of the defendant, Borg-Warner (R. 15, 18).

As noted earlier, Norge Sales was a separate corporation created in 1954 to market Norge brand products. It has always been conceded that Norge Sales was a subsidiary of Borg-Warner (R. 86, Tr. 2490). But, throughout this litigation Borg-Warner has contended, and still does contend, that it is entitled to recognition of its separate entity, and that it is not responsible for the acts and decisions of its subsidiary absent a showing of agency, or grounds for disregarding the corporate entity of Norge Sales. The record reveals that this "separate entity" question was a continual point of contention between counsel for appellants and Borg-Warner (Tr. 2386, 2633, 2834).

The trial court found it unnecessary to decide this issue.¹² Therefore, in this brief, it is *assumed*, as the trial court assumed, that the acts and declarations of representatives of Norge Sales are attributable to Borg-Warner. Even construing the evidence in this light,

12. Contrary to appellants' statement that the separate entity point was "found to be without merit" (Br., p. 127) the trial court simply stated in its memorandum opinion:

"Borg-Warner's contention that it is a separate corporate entity and that the evidence is insufficient to go to the jury on the question of Borg-Warner's responsibility for the activities of Norge Sales appears to the Court to be without merit; however, assuming that Borg-Warner may be held responsible for the activities of Norge Sales, there is insufficient evidence in this case from which a jury could reasonably or fairly infer that Norge Sales participated in the conspiracy charged. *Under the circumstances, any discussion concerning the separate corporate entities of Borg-Warner and Norge Sales is moot.*" (Emphasis added.) (R. 1962)

that most favorable to appellants, there is no evidence of knowledge or participation by Borg-Warner in any conspiracy or combination to boycott U.S.E. or Manfree or to violate any antitrust law.

It is only necessary here to note that throughout the trial, counsel for appellants seized every opportunity to confuse the names "Norge Division" and "Norge Sales Corporation". (See for example Tr. 2935-2937). The same procedure has been followed in appellants' opening brief.¹³

The instances cited in footnote 13 are only a few examples of the deliberate attempt by appellants' counsel to confuse the Norge Division of Borg-Warner with the separate company named Norge Sales Corporation. The record of the trial court proceedings with respect to Borg-Warner is understandable only when this "corporate entity" issue is made apparent.¹⁴ No more need be said about this issue on this appeal.

At no time did Norge Sales sell directly to retailers. Rather, it sold entirely to independent distributors operating under franchise agreements and located in principal cities throughout the country (Pl. Ex. Nos. 1771, 1772, 1775). There were four such independent distributors of Norge products in California during the period 1958 to 1964 (Tr. 2916). Lancaster in San Francisco became the

13. For example, at pages 40 and 128 the witness, Gene Schick, is described as a factory regional representative of Borg-Warner. The evidence is uncontradicted that Mr. Schick was the western regional manager of Norge Sales (Tr. 2367, 2913, 2919); at page 82, it is claimed that a certain document (Pl.Ex. for Id.No. 431) came from Borg-Warner's files. This exhibit shows on its face that it was produced from the files of Norge Sales and counsel for Borg-Warner so stated. At page 118, appellants assert: "Borg-Warner's Norge Division directly participated in the boycott of Manfree (Tr. 2590-2592)". The reference is to a meeting at the Villa Hotel in San Mateo, California in April, 1959, at which Harold Bull and Gene Schick were present. These gentlemen were employees of Norge Sales (Tr. 5365-5366, 5384, 2913). No representative of Borg-Warner was present at the Villa Hotel meeting. At page 128, appellants state that Borg-Warner promulgated price sheets to Norge dealers showing retail list prices. The price sheets in evidence are those of Norge Sales (Pl.Ex.No. 1924; Tr. 2666).

14. Thus the portions of the deposition of Judson Sayre read into evidence at the trial by appellants (Tr. 2474-2571) were devoted almost entirely to this issue.

franchised dealer for Norge products in northern California in 1955 (Tr. 2363-2364).

Neither Borg-Warner or Norge Sales exercised or attempted to exercise any control whatever over the disposition of Norge appliances which had been sold to independent distributors like Lancaster. Once the merchandise was delivered to a transportation company in good order by Norge Sales the risk of loss or damage passed to the distributor (Pl. Ex. Nos. 1924 F, O, Q; 46; 47; 48).

There was no evidence that Borg-Warner or Norge Sales dictated or attempted to control the business policies or judgments, or methods of operation of its independent distributors. The distributors on their part agreed with Norge Sales that they would concentrate their best sales efforts within the designated territory so as to give complete and satisfactory coverage in the territory with regard to the sale and service of Norge products, and also agreed not to engage in any business or advertising practice which would be in violation of any better business bureau policy or of any local ordinances which might serve to destroy or damage any goodwill attached to the name of "Norge" (Pl. Ex. Nos. 46, 47, 48).

Appellants in an attempt to implicate Norge Sales in a conspiracy repeatedly refer to a meeting at the Villa Motel in San Mateo, California, at which representatives of Norge Sales were present (Br. pp. 51-52, 90, 101, 127). The facts surrounding this meeting as shown by uncontradicted evidence are as follows. Commencing in February 1958 Norge Sales instituted its "Consumer Protection Policy." This procedure was established to ensure that purchasers of Norge products would receive the benefit and protection of the manufacturer's warranty (Pl. Ex. No. 4019). Under this plan a purchaser of a Norge machine in San Francisco could look to the local distributor, Lancaster, for parts and service under the warranty, even though the appliance may not have been sold by Lancaster. In order to provide the distributor with funds to carry out this warranty service, a fixed amount of the price of each Norge appliance was "built in" to the purchase price and retained by the distributor as a service reserve. If another distributor had made the sale, obviously the distributor in the ultimate purchaser's

home area would not have money to provide the warranty service (Tr. 5380-5381).

In approximately April, 1959, Mr. Gilbert Freeman, then the general sales manager of Lancaster, learned that there were Norge appliances at U.S.E.¹⁵ Freeman instructed his salesman to get the serial numbers of these appliances. It was then determined by Freeman that Lancaster had never handled these items and this fact was reported to Schick, the western regional manager of Norge Sales (Tr. 2717-2719, 2966-2968). Schick checked the serial numbers with the Chicago office of Norge Sales and then reported to Freeman that the merchandise was part of a carload which had been originally shipped to Graybar in Los Angeles, and then transshipped to San Francisco (Tr. 2719, 2969-2971, 5373).

Freeman then put out a bulletin to the Lancaster personnel that warranty parts and service on these machines were not to be provided by Lancaster (Tr. 2719). Mr. Bull, vice-president in charge of sales of Norge Sales, caused a debit memo of \$17.50 to be issued to Graybar reflecting the deduction of a portion of the money received by Graybar for sale of one of the subject appliances. This same amount would then be credited to Lancaster for warranty service (Pl. Ex. Nos. 4011, 4014; Tr. 2977-2980).

This brought forth a complaint from Mr. Bonnet, the sales manager of Graybar, addressed to Bull, saying that Graybar hadn't demanded the warranty money when other Norge distributors had shipped goods into the Los Angeles area, and that Lancaster ought to forget it. In this letter Bonnet suggested a meeting between himself, Bull and Freeman to discuss the matter (Pl. Ex. No. 4023).

It happened that Bull was then traveling around the country attending various product showings. One was scheduled for April 29, 1959 at the Villa Hotel in San Mateo. Bull instructed his correspondent in Norge Sales, Mr. Berthold, to send telegrams

15. Manfree had been a Lancaster customer with respect to Norge appliances during the period May-September 1957 (Tr. 2581). Lancaster had dropped Manfree as a customer a year and a half before this incident occurred because of U.S.E.'s use of "bait and switch" advertising in connection with Norge products (Tr. 2866-2869).

to Bonnet and Freeman to arrange a meeting to discuss this "transshipment" problem (Tr. 2717, 2726, 5375-5380; Pl. Ex. No. 4029).

Present at the meeting at the Villa Hotel were, Messrs. W. J. Lancaster and Gilbert Freeman from Lancaster, Messrs. Eugene Schick and Harold Bull from Norge Sales, and Mr. Ed Bonnet from Graybar of Los Angeles (Tr. 2388, 2983, 5370). The topic of discussion concerned the fairness and propriety of the \$17.50 per appliance warranty charge that Graybar, under the Norge Consumer Protection Plan, was to pay to Lancaster if it shipped Norge products into the Lancaster distribution area (Tr. 2984, 2723, 2388-2391, 5380-5382). Since the matter was one between the respective distributors, Bull's function at the meeting was simply to get the distributors together to discuss and settle the matter between themselves (Tr. 5382). There is no evidence that Schick said or did anything at this meeting. Bull left after about ten minutes of explaining the warranty charge to the distributors (Tr. 2985, 5380). There is no evidence of any representative of Borg-Warner or Norge Sales knowing, or attempting to find out how the distributors resolved the dispute. Schick testified he thought Lancaster waived the \$17.50 per appliance charge (Tr. 2984).

3. W. J. LANCASTER CO.

The principal office of Lancaster is located in San Francisco, and the company engages in the wholesale distribution of major appliances and television sets as well as other types of merchandise. At various times it has been the distributor for Motorola radios and television sets, Norge appliances, Thor washing machines, Shopsmith power tools, and Kitchen-Aid dishwashers (Tr. 2358). Of course, appellants do not contend that there was any corporate connection between Borg-Warner or Norge Sales and either Motorola, Thor, Shopsmith, Kitchen-Aid, or any other supplier of products to Lancaster.

Lancaster was not an affiliate or agent of Norge Sales. After purchasing Norge appliances from Norge Sales it sold these prod-

ucts to customers of its own choosing. At various intervals during the relevant period of time, 1957 to 1964, Lancaster had among its customers in San Francisco, Hales, Macy's, Emporium, Lachman Bros., Manfree, and the appliance concession at GET discount store (Tr. 2367-2368, 2419, 2581, 2895).¹⁶ Also during portions of this same period, Lancaster sold Norge appliances to various discount stores throughout the San Francisco Bay Area including WASCO, a store in Daly City, and White Front Stores in Oakland and San Leandro (Tr. 2623, 2783). There is no evidence that Lancaster consulted with Norge Sales, Borg-Warner, or any other company concerning the opening or closing of any of these accounts.

Lancaster cancelled the Manfree account in September, 1957, because of what Lancaster's sales manager, Gilbert Freeman, considered to be unethical advertising practices. These practices consisted of the so-called "bait and switch" newspaper advertisements run by U.S.E. (Tr. 2585, 2594, 2866-2869, B-W. Ex. Nos. 9025, 9026). Because of this type of advertising, Gilbert Freeman gave instructions to the Lancaster salesman in the U.S.E. area, Jack Mitchell, to cancel the account (B-W Ex. No. 9027). The decision to stop selling Norge products to Manfree was wholly that of Lancaster, without any direction or suggestion from either Borg-Warner or Norge Sales or any other company or person outside of the Lancaster organization (Tr. 2877).

Lancaster reported on a monthly basis to Norge Sales the number of units sold to the various retailers in the Lancaster distribution area.¹⁷ The report form was supplied by Norge Sales to Lancaster and the listing of retailers on the form was printed by personnel at Norge Sales from information supplied to them by Lancaster. Lancaster simply inserted numbers in the form indicating

16. In 1957 Lancaster had approximately 140 customers in San Francisco who were reported by Lancaster to be Norge dealers. The McLab account at GET discount store bought twice as many Norge appliances from Lancaster in 1957 as did Manfree and was not cancelled by Lancaster (Pl. Ex. No. 4058Y).

17. This report was called the "Norge Distributors Monthly Dealer Purchase Report" (Pl. Ex. Nos. 4058, 4059).

how many Norge washing machines, dryers, refrigerators, or other types of appliances had been sold to each of its customer retailers during the preceding month (Tr. 2793-2798, Pl. Ex. Nos. 4058, 50A-50G).

Lancaster also periodically received from Norge Sales a "county analysis report," also called a "penetration report." This report showed the total number of various types of appliances sold in a particular county (termed "association units"), the number of Norge appliances sold in the same area for the same period of time, and the resulting percentage of Norge sales with respect to total sales in the market area (Tr. 2803-2807, Pl. Ex. Nos. 168-173). These reports showed only the Norge percentage and not that of any other company.

Lancaster, as the northern California distributor for Norge products, would from time to time receive price lists prepared by Norge Sales showing the cost to Lancaster of Norge appliances. These often contained suggested retail prices (Tr. 2830, 3010-3012, Pl. Ex. No. 1924). Often such price sheets contained no suggested retail prices for various models (Tr. 3015-3016).

Lancaster prepared its own price sheets which contained suggested retail prices. These were periodically distributed to Lancaster's retail customers. The suggested retail prices on Lancaster price sheets were sometimes the same as those suggested by Norge Sales and sometimes not (Tr. 2647, 2659, 2830-2831). The Lancaster suggested price was strictly a result of its own decision and was not controlled either directly or indirectly by either Norge Sales or Borg-Warner (Tr. 2647, 2659). There was no evidence that either Borg-Warner or Norge Sales ever demanded that Lancaster use on its price sheets the retail prices suggested by Norge Sales. Nor was there evidence that they demanded that Lancaster require retailers to use the Norge suggested prices. Nor was there any evidence that either Borg-Warner or Norge Sales made any effort to check whether or not its suggested retail prices were being employed either in advertisements or actual sales.¹⁸

18. Schick, the western regional manager of Norge Sales, testified that he knew of no instance where the Lancaster suggested retail price was compared with the Norge Sales suggested retail price (Tr. 3011).

Lancaster had various advertising funds available to it which were utilized in connection with Norge products (Tr. 2672). A portion of these funds was composed of "factory money" (money contributed directly by Norge Sales) and a portion constituted Lancaster "matching funds" (see pl. Ex. Nos. 4101, and 4102). Lancaster used these funds to pay a fraction of the promotion and advertising expenses of retail dealers in connection with Norge products (Tr. 2419-2422).

It was Lancaster's policy not to allow claims by retailers against the cooperative advertising fund unless the advertisement either specified Lancaster's suggested retail price, a weekly term price, or no price at all (Tr. 2407, 2648, Pl. Ex. No. 4355). This policy was strictly the result of a Lancaster business decision. There was no rule imposed by Borg-Warner or Norge Sales that a dealer in order to qualify for cooperative advertising funds had to advertise the retail price suggested by Norge Sales (Tr. 2680). Nor was Lancaster aware that some other distributors at varying times had similar policies with respect to qualifying for cooperative advertising funds (Tr. 2407).¹⁹

D. Contacts and Dealings Between Borg-Warner and Norge Sales and Manufacturers or Distributors of Major Household Appliances Other Than Norge.

1. CONTACT WITH MANUFACTURERS.

Borg-Warner and Norge Sales had no arrangements or agreements with other manufacturers, either express or tacit, concerning the manner in which either of said companies, or any other company or firm in the appliance industry would conduct its business. The record is devoid of evidence of mutual understandings

19. Graybar, the local distributor for Hotpoint appliances had such a policy in 1959 (Pl. Ex. No. 339A). It should be noted, however, that the suggested prices to be used were *Graybar's*, and not Hotpoint's. Hotpoint had discontinued the use of suggested prices by this time (Tr. 3277-3278). California Electric Supply Co. had a similar policy in 1960 (Tr. 664, 669; Pl. Ex. No. 342).

This practice was not, however, uniform among distributors. Neither Maytag West Coast or General Electric required dealers to advertise at the suggested list price in order to get co-op money (e.g. Tr. 3383-3403 [Maytag], 5225 [G.E.]). Nor did Frigidaire ever require its dealers to advertise at suggested prices (Tr. 1315-1317, 4088).

or agreements with any other manufacturer concerning the production or non-production of appliances, the quantity to be produced, the design or functional features to be included, or the method or manner of distribution either of Norge or any other brand of appliance. There was no evidence of agreement or collusion with respect to the establishment of the prices to be charged for Norge products, either to wholesalers or retailers. Nor was there any showing of joint or cooperative effort among any of the appellee manufacturers to establish uniform suggested retail prices, or to require retailers to advertise or sell at suggested prices (Tr. 901, 1183, 1604, 2228-2229, 3279, 3333, 5029). Nor was there any evidence whatever that there was ever any agreement among the manufacturer appellees or alleged co-conspirators as to how "suggested retail prices" were to be utilized²⁰ (Tr. 2549). There was no evidence that Borg-Warner or Norge Sales had any knowledge or interest in whether other manufacturers published suggested retail prices, or how they used them.

The record fails to show any contacts at all between Borg-Warner and Norge Sales and other manufacturers of appliances except such as were incidental to membership in either the American Home Laundry Manufacturers Association (AHLMA), or the National Electrical Manufacturers Association (NEMA)²¹ (Tr. 2552-2553, 3494-3495, 5392-5394). On occasions representatives of either Borg-Warner or Norge Sales were present at some of these meetings (Tr. 2552). Obviously, representatives from

20. Indeed, a number of manufacturers discontinued the publication of suggested list prices during the period covered by the complaints herein. Frigidaire ceased the use of suggested retail prices upon introduction of its 1961 models (Tr. 4209); by January 1959 the Hotpoint Division of General Electric had discontinued the use of suggested list prices (Tr. 3277-3278); Whirlpool stopped the use of suggested prices on its price sheets as of January 1961 (Pl. Ex. No. 1934, 1935).

21. Various of the defendant manufacturing companies at one time or another were members of either or both of these associations. For NEMA, these included Westinghouse, Whirlpool, General Electric, Borg-Warner (Tr. 5410-5411, 2552). Members of AHLMA included Westinghouse, Whirlpool, General Electric, Borg-Warner, Philco, Maytag, General Motors (Tr. 3484-3485).

other manufacturers were also present at such meetings.²² There was no evidence presented at the trial that Borg-Warner or Norge Sales or any other manufacturer utilized these trade associations, or any committees established by such associations, or any meetings, projects, or promotions of such associations to violate the antitrust laws of the United States.

There was simply no evidence whatever of collaboration or concert of action among *any* of the manufacturers in formulating business policies, whether with respect to methods of distribution, advertising funds, prices, or otherwise. Nor was there a speck of evidence that either Borg-Warner or Norge Sales attempted or proposed to suggest to other manufacturers what they should do with regard to their policies on these same matters.

No representative of Norge Sales or Borg-Warner ever discussed the sales policies of those companies with representatives of other manufacturers. Neither U.S.E., nor Manfree, nor any other retail dealer was discussed by representatives or agents of Borg-Warner or Norge Sales with any other manufacturer. In every instance where witnesses were asked directly about conversations concerning selling or not selling to appellants it was clearly stated that no such discussions ever took place.²³

2. CONTACTS WITH DISTRIBUTORS.

The record fails to show any contacts or dealings between Borg-Warner and Norge Sales and any *distributors* of products other than Norge brand appliances. There were simply no arrangements, agreements, understandings, or any other form of cooperative efforts or communications between Borg-Warner and

22. The identity of the persons present at particular meetings, and the specific subject matters which were discussed at any such meetings of these associations were never established by appellants. Though certain documents were offered purporting to be minutes of meetings of NEMA, they were properly excluded for lack of foundation with respect to genuineness and authenticity.

23. See for instance: Tr. 4282-4283 (Cronin of Frigidaire); Tr. 4194-4195 (Gough of General Electric); Tr. 4396-4398 (Lau of General Electric); Tr. 4440 (Ransom of Hotpoint); Tr. 3404-3405 (Mitchel of Maytag West Coast); Tr. 4610 (Saxon of RCA); Tr. 5175 (Walker of Whirlpool).

Norge Sales and distributors of the products other than Norge. Nor did Borg-Warner or Norge Sales attempt to have such agreements or arrangements with other companies indirectly through Lancaster. When Lancaster decided to drop Manfree as a customer, that fact was not discussed or communicated, either before or after the termination, with other distributors of home appliances or anyone else (Tr. 2877, 3276, 1038, 1667-1668, 2353). Lancaster did not even discuss its decision with Borg-Warner or Norge Sales.

E. Contacts and Dealings Between Borg-Warner and Norge Sales and Retailers of Major Home Appliances and Television Sets.

The contacts and dealings between Borg-Warner and Norge Sales and the various retailers named as defendants in these cases were minimal and of no material significance. Neither Borg-Warner nor Norge Sales had any direct interest in retailer activities, since Norge Sales chose to sell only to independent distributors. In the San Francisco Bay Area it was Lancaster's business to establish retail outlets for Norge products. Lancaster purchased the Norge appliances outright from Norge Sales. It did not handle these products on a consignment basis or as a sales agent for either Norge Sales or Borg-Warner. The retail stores in San Francisco were the customers of Lancaster, not the customers of Norge Sales or Borg-Warner (Tr. 538, 694, 6041-6043). Any contact between representatives of Borg-Warner or Norge Sales and the retailers was either purely coincidental, or merely for purposes of establishing goodwill in connection with the Norge trademark.

The record is barren of evidence showing any meetings or conversations or any other form of contact between representatives of Borg-Warner and Norge Sales on the one hand and representatives of either Lachman Bros., Sterling Furniture Company, or Redlicks on the other. While Macy's was shown to be a key account of the Lancaster company (Tr. 2685), there is no evidence whatever of any contact between Macy's representatives and Borg-Warner or Norge Sales. Hale was also a key account of Lancaster during part of the period 1957-1964 (Tr. 2419, 2765). It is clear

that any dealings Hale had with respect to the purchase of Norge appliances were with Lancaster, and not with Borg-Warner or Norge Sales (Tr. 549, 2433). Sanford, General Manager of the Appliance Division of Hale between March 1957 and July 1959 (Tr. 505), could not recall meeting or even hearing of Gene Schick who was the western regional manager of Norge Sales during the latter portion of this same period of time (Tr. 542-543).

Appellants were only able to show several meaningless encounters between persons employed by Norge Sales and Hale. One was a meeting between Judson Sayre (the president of Norge Sales) and Richard Sanford of Hale in 1959. This meeting took place during the January Market in Chicago. Such "markets" are annual events at which representatives from distributors and retailers throughout the country visit the Merchandise Mart in Chicago to view the new products being offered for sale by the various manufacturers. Because Sanford had known Sayre for many years in connection with the appliance business, Sanford during his visit to Chicago called on Sayre to say "hello" and chat with him. No business matters were discussed at this meeting (Tr. 527-537).

A similar meeting occurred between Roy Hurd of Hale and Harold Bull of Norge Sales sometime between 1955 and 1960. There is no evidence of there being any conversation between these gentlemen other than being introduced to each other at a trade show (Tr. 5386-5388).

A third instance of a meeting involving Norge Sales and Hale personnel was that of Gene Schick meeting Mr. Paul Thomas at a new line showing. Schick could not recall the time or place of this meeting (Tr. 2962-2963). The evidence developed nothing beyond these simple and meaningless facts.

It was the practice of Norge Sales and other companies to host cocktail parties at the time of the January trade shows in Chicago. Norge Sales invited distributors of Norge products throughout the country to its party and distributors could in turn invite some of their customers (Pl. Ex. No. 4096B, Pl. Ex. for Id. No. 4092). Sanford recalled that there were hundreds of people at such

parties; that he received many invitations to such parties; and did in fact attend some, although he could not specifically recall attending a Norge cocktail party (Tr. 545-547).

In summary, the few contacts and dealings by either Borg-Warner or Norge Sales with other companies whether manufacturers, distributors or retailers were entirely lawful, and devoid of antitrust significance.

F. Contacts and Dealings Between Borg-Warner and Norge Sales and Appellants.

Neither Borg-Warner nor Norge Sales had any business dealings with appellants. What little communication there was between appellants and Borg-Warner or Norge Sales was generated by appellants on the eve of this lawsuit and after its commencement (Pl. Ex. Nos. 4286, 4038, 1773).

Bernard Freeman, an officer of both USE and Manfree, testified to the steps which Manfree took in 1957 to become a retail dealer of Norge appliances. First the good credit of Manfree was established with Lancaster, then orders for Norge Brand products were submitted to Lancaster. Payment for all Norge appliances ordered by Manfree was made to Lancaster (Tr. 6041-6044). Freeman also requested advertising funds for Norge products from the Lancaster salesmen (Tr. 5807). In short, all of the transactions of Manfree in connection with Norge appliances were with the local independent distributor for Norge products, Lancaster and there were no dealings or communications between Manfree and either Borg-Warner or Norge Sales.

When Lancaster, for good reasons of its own, chose to drop Manfree as a customer in 1957, attorneys then representing appellants sent a letter to Lancaster requesting an explanation of the cancellation (Tr. 2383). No similar letter or other communication was addressed to Borg-Warner or Norge Sales by appellants.

The only contacts which Borg-Warner and Norge Sales have ever had with either of the appellants came through a series of three "demand" letters addressed to them from Manfree in the years 1960, 1961 and 1963 (Tr. 5950-5955, Pl. Ex. Nos. 4286, 4038, 1773). Norge Sales replied to each of these letters (Pl. Ex.

Nos. 1772, 1771, 1775). Aside from these form letters,²⁴ appellants had no other dealings or communications with Borg-Warner or Norge Sales whatever; nor was there any showing of attempts made by appellants to have further dealings, discussions, or negotiations with either of said companies.

The replies of Norge Sales²⁵ to each of appellants' three letters advised them that Norge products were sold to retailers through independent distributors, and that the distributor in appellants' area was Lancaster. Lancaster was notified of appellants' requests for Norge products directly by Norge Sales (Pl. Ex. Nos. 1772, 1771). The first of these demand letters was referred to Lancaster by Norge Sales with the request that Lancaster contact Manfree "if the request is in order" (Pl. Ex. No. 556). Norge sales did not make any investigation or inquiry as to what Lancaster had done with respect to the Manfree request (Tr. 2883).

IV.

ARGUMENT

A. The Trial Court Correctly Granted a Directed Verdict in Favor of Appellee Borg-Warner Corporation.

1. THE GENERAL PRINCIPLES GOVERNING DIRECTED VERDICTS WERE PROPERLY APPLIED BY THE TRIAL COURT.

At the conclusion of plaintiffs' case all of the defendants, including appellee Borg-Warner, moved the court for a directed verdict and dismissal of the complaint (Tr. 6609; R. 1794).

The standard for determining whether or not a directed verdict

24. The 1960 "demand" letter (Pl. Ex. No. 4286) is the same as that sent to numerous other appellees and alleged co-conspirators. For example, Pl. Ex. Nos. 492, 4280, 4284. The 1961 "demand" letter to Borg-Warner (Pl. Ex. No. 4038) is the same as letters addressed to other appellees and alleged co-conspirators bearing Exhibit Nos. 496, 4271, 4282. The 1963 "demand" letter to Norge Sales (Pl. Ex. for Id. No. 1773) was stipulated to be the same in content as Pl. Ex. No. 1722 which was conceded to be a form letter sent to various of the appellees and alleged co-conspirators (Tr. 5932).

25. The first two replies were written by J. D. Dougherty, the General Sales Manager of Norge Sales; the third reply was written by attorneys for Norge Sales, the third "demand" letter having been sent out by appellants more than three years after the commencement of the present litigation.

should be granted is basically this: where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion, then the court should grant a directed verdict in favor of that party. This circuit has applied the rule of *Brady v. Southern Railway Company*, 320 U.S. 476, 479 (1943) with respect to the manner in which the evidence is to be viewed on an appeal from a directed verdict. Thus, in *Shafer v. Mountain States Telephone & Telegraph Co.*, 335 F.2d 932 (9th Cir. 1964), the court said as follows:

"This court has recognized the rule that '(U)pon appeal from a judgment of dismissal entered upon the close of a plaintiff's case-in-chief, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the claim or cause of action asserted.' *Kingston v. McGrath*, 9 Cir. 1956, 232 F.2d 495, 497, 54 A.L.R.2d 267. On the other hand, '(W)hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims' *Brady v. Southern Ry. Co.*, 1943, 320 U.S. 476, 479, 64 S.Ct. 232, 235, 88 L.Ed. 239." (Emphasis added)²⁶

The trial court correctly determined that the evidence and *logical* inferences therefrom, viewed most favorably with respect to appellants, would not support a finding that any of the appellees were guilty of conspiring to restrain or monopolize interstate trade in major home appliances or television sets. In so doing it properly looked to all the proven facts and circumstances surrounding appellees' dealings, or lack of dealings, with appellants, with other alleged co-conspirators, and with each other.

26. All emphasis hereinafter appearing in this brief is that of the present writer unless otherwise specified.

In this respect, the statement of the Court in *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949) is pertinent. That case involved a criminal prosecution under the antitrust laws for price fixing. In reversing a conviction the appellate court said with respect to the evidence in the case:

"This testimony, we think forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices. Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses. Inferences are not themselves evidence but are the result of evidence and are based upon circumstances to take the place of actual proof. When, however, substantial proof is made contrary to the fact inferred, the inference is completely refuted."

This Circuit follows the same rule. Thus in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *Cert. Denied* 375 U.S. 922 (1963), this court, in upholding a directed verdict for defendants, said of the evidence (pp. 661-662):

"The inference of conspiracy, based upon the defendants' approximately simultaneous change in their manner of dealing with plaintiff, might have been permissible in the absence of evidence showing that their respective actions were prompted by some fact other than mutual understanding or agreement. However, here it appears beyond question that outside factors dictated the change.

* * *

"... In this milieu we see no justification for an inference of any Sherman Act violation from the fact that all the defendants changed their mode of distribution at about the same time."

Had the matter been allowed to go to the jury in *Independent Iron Works*, the jury might have arbitrarily rejected the explanation of the defendants. Despite the proven facts of shortage of steel and increased demands, the jury might have sided with plaintiff's bald assertion that the change in the mode of distribution of defendants was pursuant to illegal agreement. But, the trial court recognized, and so did this court, that any such conclusion would not have been one reasonably drawn from the proven

facts, and therefore, that a directed verdict was called for. The same situation is presented in the present case.

2. APPELLANTS FAILED TO PRESENT ANY COMPETENT EVIDENCE OF CONSPIRACY INVOLVING BORG-WARNER, OR NORGE SALES, OR ANY OTHER APPELLEE.

a) No Inference of Conspiracy to Boycott Appellants Arises Because of Lancaster's Termination of the Manfree Account, or Because Borg-Warner and Norge Sales Refused to Sell Directly to Manfree.

In order for appellants' case on liability to go to the jury with respect to *any* of the appellees, appellants must have presented sufficient evidence to support a finding 1) that a conspiracy to restrain or monopolize interstate trade existed between an appellee and at least one other appellee or alleged co-conspirator and, 2) that an overt act was committed pursuant to such conspiracy which was the cause of injury to appellants. *Flintkote Company v. Lysfjord*, 246 F.2d 368, 374 (9th Cir. 1957). Beyond this, however, for appellants' case to go to the jury with respect to Borg-Warner, (Norge Sales was already dismissed pursuant to Summary Judgment) there must have been evidence that Borg-Warner knowingly participated in any such alleged conspiracy. *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963); *Standard Oil Company of California v. Moore*, 251 F.2d 188, 211-212 (9th Cir. 1957).

Appellants failed to present evidence of any conspiracy between or involving any of the appellees. Of course, there was no direct evidence of any conspiracy or agreement to boycott either U.S.E. or Manfree. Appellants' assertion that there was direct evidence of a boycott against them (Br. p. 86) is not borne out by the record, or even by appellants' arguments. (See Br. pp. 78-80, summarizing the evidence which appellants claim constitutes the evidence that a conspiratorial boycott existed.)

For proof of the alleged conspiracy and concerted refusal to deal appellants rely upon *circumstantial* evidence. It is, of course, conceded that there need be no express agreement to constitute an unlawful combination or conspiracy, and that an antitrust violation may be found in a course of dealings or other circumstances. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946);

Standard Oil Company of California v. Moore, supra. However, appellants proved no such course of dealings or circumstances.

As one piece of circumstantial evidence, appellants rely heavily upon the fact that suppliers of various brands of major home appliances and television sets, including those manufactured by the the manufacturer appellees herein, "refused to deal with Manfree" (Br. pp. 41-52, 54-62). This type of evidence must be analyzed in the light of *Theatre Enterprises v. Paramount Film Distributing Corporation*, 346 U.S. 537, 541 (1953), where the Court held:

"[T]his court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

The business behavior which appellants characterize as "refusals to deal" encompasses a wide variety of action or inaction by appellees and alleged co-conspirators. Some companies sold merchandise to Manfree at different periods of time; some never sold to Manfree but sent representatives to visit the premises of U.S.E. and thereafter decided not to have Manfree as a customer; some, including Borg-Warner and Norge Sales, never sold products to Manfree or even visited U.S.E. for the reason that they didn't sell to any retailers. The "refusals" relied on by appellants thus not only fall short of being similar business behavior, they are in many instances positively dissimilar behavior.

In *Milgram v. Loew's*, 192 F.2d 579 (3rd Cir. 1951), a case dealing with inferences of conspiracy from uniformity of action by the defendants, the trial court found that the uniform refusal of eight distributors to license first-run films to plaintiff was the result of concerted action. The appellate court in upholding this finding said at page 583:

"... This uniformity in policy forms the basis of an inference of joint action. This does not mean, however, that

in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on a first-run to a drive-in even if a higher rental is offered. *Each distributor has thus acted in apparent contradiction to its own self interest. This strengthens considerably the inference of conspiracy*, for the conduct of the distributors is, in the absence of a valid explanation, inconsistent with decisions independently arrived at."

Contrast the present case, where the plus factor of "activity against self interest" is totally lacking. Indeed, the "market context" shown by the evidence here strongly suggests that Manfree was not a desirable retail outlet for major appliances. Manfree was a small concession in a "warehouse" type of building on the outer fringes of San Francisco; its salesmen were not specifically trained or motivated to sell any particular brand (Tr. 5639-5640); it was a new and untried company whose predecessor as the major appliance concession at U.S.E. had gone out of business after financial difficulty (Tr. 5712); its sales performance with various brands of major appliances was not noticeably successful (Manfree sold only 51 Norge appliances during the five month period May to October 1957²⁷ (Pl. Ex. No. 50-B); and its potential customers were limited to persons possessing a U.S.E. membership card until October 1961 (Tr. 5999-6000).

The trial court, in holding that the various reactions and responses of appellees and alleged co-conspirators to the demands of Manfree did not rise to the level of creating a logical inference of joint or concerted action, correctly applied the test recognized and applied by this court in *Flintkote Company v. Lysfjord, supra*, p. 377:

"The decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their context."

27. By contrast, Macy's of San Francisco had sold 288 Norge appliances during the period January to October, 1957 (Pl. Ex. No. 4058Q).

Here the market context proved beyond all doubt that the refusals of Norge Sales and Borg-Warner to sell appliances directly to Manfree were because these appellees had an established policy of not selling to any retailers. There is no similarity whatever between the facts of the present case and *Flintkote*, where the evidence clearly showed a conspiracy among acoustical tile dealers of which Flintkote had knowledge, coupled with threats of these dealers to refuse to buy from Flintkote if it continued to sell to plaintiffs.

The trial court also correctly applied the standard enunciated in *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746-747 (N.D. Cal. 1959), *aff'd* 322 F.2d 656 (9th Cir.), *cert. denied* 375 U.S. 922 (1963).

"There must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. . . . The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

In the present case there was no "sameness of conduct" so far as the actions of appellees and alleged co-conspirators toward appellants. It is true that certain distributors in the San Francisco area at one time or another chose not to continue Manfree as a customer; and that certain other distributors and manufacturers never supplied Manfree major home appliances or television sets. To say, as appellants do, that this is sufficient evidence for the trier of fact to find a conspiracy, agreement, or concert of action, is to ignore all the specific and detailed variations in appellees' dealings or contacts with appellants. Neither in time, nor in activity, nor in reasons for appellees' business behavior toward Manfree was there parallelism, much less uniformity. Further, there is no evidence that the action of any appellee with respect to Manfree or U.S.E. was done with consciousness of how others were dealing with appellants.

Thus, Lancaster, the local distributor of Norge products, sold the Norge brand major household appliances to Manfree during the period May-October, 1957. Its cancellation of Manfree as a customer came because of what Lancaster considered to be "un-ethical" advertising practices (Tr. 2594, 2867, 2874A-2877, B-W Ex. 9027). The record is absolutely devoid of any evidence that this action by Lancaster was at the request, suggestion, or demand of either Borg-Warner or Norge Sales. In fact, the only evidence on this point is directly to the contrary (Tr. 2877). No other distributor was shown to have cancelled Manfree at this same time. No other company cancelled Manfree because of its use of bait and switch advertising. No other company, *including Borg-Warner and Norge Sales*, was notified of Lancaster's action with respect to Manfree either before or at the time of the cancellation.²⁸ Though Norge Sales was *later* notified of the cancellation, there is no evidence that any other company became aware of it.

As to the distributors who dealt with Manfree at some period of time there was no uniformity or similarity in conduct or attitude toward Manfree. The mere fact that at different times each of these distributors independently and for separate and distinct reasons of its own decided not to continue the Manfree account, when viewed in the light of other established facts and the "market context" does not suggest any concert of action. (See Tr. 3269-3271, 3375-3379, 3691-3693.)

No inference may be drawn that Borg-Warner or Norge Sales was a member of any alleged conspiracy to boycott appellants simply because Lancaster cancelled the Manfree account in September of 1957. Manfree was one of at least 140 San Francisco dealers of Lancaster who carried Norge products in 1957 (Pl. Ex. No. 4058X,

28. The "Norge Distributors Monthly Dealer Purchase Report" was used by Lancaster to notify Norge Sales of cancellation of retailer accounts (Pl. Ex. No. 4058). This record shows that Lancaster didn't report the termination of the Manfree account until April 1958 (Pl. Ex. No. 4058AI). Until then, Norge Sales continued to list Manfree as a Lancaster customer. This is striking evidence that Norge Sales did not keep track of its distributors' actions with respect to retailers. Norge Sales had no information that Manfree was no longer a customer of Lancaster's until that fact was reported to it by Lancaster *six months* later.

Y, Z). Bernard Freeman, president of Manfree, testified that Noriega Hardware, K. C. Richards, House of Karlson, Balboa Furniture, Barnell Company, and Charon, [sic] among others, were stores in San Francisco selling major household appliances and television sets at discount prices. That is, selling at less than "list prices" (Tr. 6005-6006). *All of these accounts were customers of Lancaster, selling Norge appliances in 1957 and 1958* (Pl. Ex. Nos. 4058 X, Y, Z, AJ, AK, 4059).

Lancaster during 1957 cancelled at least seventeen customers in San Francisco, not including Manfree. *Not one of these cancellations was of the above named companies that appellants admitted were "list price" cutters* (Pl. Ex. No. 4058 X, Y, Z).

Young Bros. presents a similar picture—a San Francisco appliance store which sold major household appliances at discount prices, ("Substantially below suggested retail prices" according to appellants' witness Marvin Boyd (Tr. 5648)). Yet Lancaster sold this company 487 Norge appliances in 1957, and 429 Norge appliances in 1958 (Pl. Ex. Nos. 4058Z, 4059AP).

G.E.T. was identified as a "discount department store" in San Francisco—similar to U.S.E. The appliance concession for that store was called McLab (Tr. 2895, 3054). The evidence shows Lancaster sold large quantities of Norge appliances to this store in 1957 and 1958 (Pl. Ex. Nos. 4058Y, AK).²⁹

The dissimilarity between the facts presented by appellants with respect to Borg-Warner and Norge Sales in the present litigation and those presented in *Standard Oil Company of California v. Moore, supra*, is at once apparent. First, the activities by the oil dealers with Moore were inconsistent. That is, one time representatives of a defendant company would say they were ready and willing to deal with Moore then later they would refuse. In the present case, Borg-Warner and Norge Sales never dealt with retailers, and Manfree was consistently referred to the

29. Indeed, while Manfree bought only 51 Norge appliances in 1957 (Pl. Ex. No. 50-B), McLab bought 167 Norge appliances in 1957 and 102 in 1958 (Pl. Ex. Nos. 4058Y, 4059AP). The supposed "list price maintenance" conspiracy conjectured by appellants is utterly discredited by this uncontradicted evidence.

local distributor, Lancaster. *Second*, the companies that refused to deal with Moore were all in a position to serve him without any change in their manner of gasoline distribution—all sold directly to dealers. In the present case neither Borg-Warner nor Norge Sales sold to retailers. It would have constituted an entire alteration in the distribution policies of Norge Sales to sell directly to Manfree. *Third*, the refusals to deal with Moore came within a very limited period of time—mainly within a matter of days after Tide Water ceased supplying Moore. In the present case some alleged conspirators were selling to Manfree more than a year after Lancaster terminated that account. *Fourth*, there was evidence in *Moore* that Tide Water made direct objections about the prices that Moore was charging, and also that Tide Water demanded that curb signs advertising the objectionably low prices be removed. Here there was no evidence that Borg-Warner or Norge Sales, or any other supplier, whether manufacturer or distributor, ever tried to control Manfree's selling prices, or even knew what they were.³⁰ In fact, there is no evidence that Manfree actually sold Norge appliances for less than such appliances were sold by other retailers such as Hale. (Hale sold appliances at discount prices (Tr. 5646)). *Fifth*, in *Moore* there was evidence that a Tide Water representative had said, "If you don't take the price sign down, when I get through with you no company in town will sell you gas." The court properly held that there was an inference that could be drawn from this that Tide Water felt assured its pressure on Moore would be supported by the other gasoline suppliers. No such evidence or anything analagous thereto was presented in this case. *Sixth*, other aggressive price cutters in *Moore* had difficulty obtaining gas. Here the evidence shows that Lancaster sold Norge appliances to other discount stores including White Front, G.E.T. and WASCO (Tr. 2623, 2783, 2895). *Seventh*, Moore showed a series of specific contacts and communications between the defendants involving various phases of business policy—including concurrent and uniform discontinuation

30. Appellants stipulated there was no correspondence between either U.S.E. or Manfree and Borg-Warner (Tr. 6185). There was no evidence of any oral communications between appellants and representatives of either Borg-Warner or Norge Sales.

of split-pump accounts; posting of tank wagon prices; uniform practice of allowing unpublished discounts; a practice of all oil companies of exchanging petroleum products with each other to meet special supply or storage problems; and the practice of getting "clearances" before taking on dealers already in business. None of these miscellaneous practices, or anything similar thereto, was shown by the evidence in the present case to be practiced by Borg-Warner or Norge Sales.³¹

As to the manufacturing appellees, the evidence shows that three of them (Borg-Warner, Whirlpool Corporation, and R.C.A.) never sold their products directly to any retailers in northern California (Pl. Ex. Nos. 95, 101, 46). Borg-Warner, at all times material herein, did not even sell to local distributors. It simply manufactured Norge brand home appliances in the division of Borg-Warner designated "Norge Division" and sold its entire output to Norge Sales (Pl. Ex. Nos. 1771, 1775). Norge Sales in turn marketed Norge brand products throughout the country to independent distributors (Tr. 2364, 2389, 2916, Pl. Ex. No. 1771). While the Distribution Agreements between Norge Sales and Lancaster for 1959 and 1960 (Pl. Ex. Nos. 46, 47) provide that "Norge may without restriction and without notice or compensation to the distributor appoint direct dealer outlets", the evidence fails to show that Norge Sales ever appointed any such direct dealer outlets or sold any of its products to retail dealers in California pursuant to this clause.

31. In a vain attempt to show a factual similarity to *Moore*, appellants rely in part upon "accommodation transfers" which were sometimes made between one retailer and another (Tr. 1308-1311, 1600). There is no similarity between this and the exchange of petroleum products in *Moore*. There was no uniform or regular practice shown of making such accommodation transfers by manufacturers or at manufacturers' requests. Further, none of the present appellees were shown to be involved with, or have knowledge of such practices. Likewise, appellants' attempt to compare the "clearance" in *Moore* with new customer credit checks is without validity (Br., p. 107). Lancaster was not shown to "clear" with other distributors such as California Electric or Graybar before taking on new retailer customers as Norge dealers.

Appellants base their charge of conspiratorial refusal to deal by Borg-Warner and Norge Sales in part upon replies to three "demand letters" of Manfree (Br., pp. 54-55, 74-76). The first of these demands was addressed to "National Sales Manager, Norge Home Appliances" and was dated June 24, 1960 (Pl. Ex. No. 4286). This letter was answered by Norge Sales and referred Manfree to the distributor in the San Francisco area, Lancaster (Pl. Ex. No. 1772). But Norge Sales did more than this. The sales manager sent a letter to Lancaster's vice-president, Gilbert Freeman, asking him to contact Manfree "if the request is in order" (Pl. Ex. No. 556). This document indicates a total lack of knowledge or information about Manfree so far as the sales manager of Norge Sales was concerned. Of course, this letter demand, Pl. Ex. No. 1772, was received by Norge Sales before the present litigation was commenced.³²

The second demand was addressed to "Borg-Warner Corporation" dated September 25, 1961 (Pl. Ex. No. 4038). This letter was likewise answered by Norge Sales, and the request was again referred to Lancaster. By this time both Borg-Warner and Lancaster were defendants in appellants' first action. There is no evidence that Borg-Warner or Norge Sales gave any instructions to Lancaster as to how to handle this request. This was just good business on the part of both Borg-Warner and Norge Sales. It was not their practice to meddle or interfere with the business decisions of the local distributors of Norge products. So long as Lancaster was maintaining a good record of sales of Norge products throughout its distribution area it was of no interest to Borg-Warner or Norge Sales who Lancaster's customers were (See Pl. Ex. Nos. 46, 47, 48). Obviously, neither of these com-

32. It should be noted that Lancaster received a similar letter from Manfree (Pl. Ex. No. 4284). It is not surprising that it did not bother to answer the request as Lancaster must obviously have known that the request was not made in good faith. Thus, the Manfree letter says that "we will be ordering in carload lots." Yet in the *five months* that Manfree was a customer of Lancaster, Manfree never ordered a carload of Norge appliances. In fact, the *total* number of appliances ordered by Manfree in that time did not amount to a carload (Pl. Ex. No. 50-B).

panies was in a position to evaluate the thousands of retail dealers throughout the country.³³

The third demand was addressed to "Norge Sales Corporation" dated November 20, 1963 (Pl. Ex. No. 1773). This letter was answered by attorneys for Borg-Warner (Pl. Ex. No. 1775, Tr. 5953-5955) and again appellants were advised to contact Lancaster inasmuch as Norge Sales did not sell to retailers. Thus it was made abundantly clear to appellants at all times that Norge Sales sold only to Lancaster in northern California as an independent distributor of Norge products (Pl. Ex. Nos. 1772, 1771, 1775). There is no suggestion by appellants, and there could be none, that Norge Sales adopted this manner of distribution only with respect to, or because of, Manfree. Thus, the far-fetched proposition of appellants that the reason that Norge Sales refused to sell Norge products to Manfree was because Manfree was a "discount" operation simply does not stand up in light of the proven facts. A jury could not be allowed to draw such an inference in the face of the evidence. *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*.

No requirement in the antitrust law compels a manufacturer to sell to a retailer just because a demand for its product has been made by the retailer. In the absence of any purpose to create or maintain a monopoly or illegal agreement, the Sherman Act does not restrict the right of a manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Borg-Warner and Norge Sales had the right, absent unlawful conspiracy, to sell or refuse to sell Manfree, or any other potential customer, for any good cause, or for no cause whatever. *Johnson v. J. H. Yost Lumber*

33. Pl. Ex. Nos. 4058 and 4059 give some idea of the number of retail dealers across the country that were involved in the sale of Norge products. These exhibits show approximately 140 Norge dealers in San Francisco alone. Neither Borg-Warner or Norge Sales could, or tried to, select the retail outlets that would best promote sales of Norge appliances. It was the business policy of Norge Sales to franchise independent distributors throughout the country who in turn were in a position to select their own customers based upon their knowledge of the local markets.

Co., 117 F.2d 53, 61 (8th Cir. 1941); *Flintkote Company v. Lysfjord, supra*.

As this court observed in *Standard Oil Company of California v. Moore, supra*, the act of an individual company in refusing to deal with another usually does not, standing alone, have anti-trust significance. Certainly if this is true with an ordinary choice of customers, that is, choosing one retailer rather than another, it is obviously so where the party asked to deal has made a policy of not dealing with *any* retailers. This is the situation with Borg-Warner and Norge Sales. A manufacturer is not compelled to sell to everyone who wants to buy his product. Were the rule otherwise, exclusive dealerships would not be possible. Courts have consistently recognized the legality of this manner of selecting customers. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *Schwing Motor Company v. Hudson Sales Corp.* 138 F.Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (2d Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

The evidence clearly shows that Norge Sales had a policy in effect, even prior to the existence of U.S.E. or Manfree, of selling its products only to independent distributors.³⁴ There is not a single instance presented by the evidence in which Norge Sales deviated from this policy. Therefore, no logical or reasonable inference of conspiracy to restrain or monopolize trade can be drawn from the refusal of Norge Sales to change this policy.

It is further clear that a manufacturer who deals through an independent distributor has the right to refuse to try to influence or change the policies of that independent distributor in regard to his manner of selecting customers. Thus, in *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3rd Cir. 1946) the court granted a dismissal of a treble damage antitrust action at the close of plaintiff's case holding that there was no inference of conspiracy because of a manufacturer's refusal to interfere with the policies of its distributor. The evidence showed that Pepsi-Cola had a contract with Cloverdale Spring Company by which the latter was appointed exclusive bottler for Pepsi-Cola. The agreement was in

34. Lancaster became a distributor of Norge products in 1955, U.S.E. opened for business in 1957 (Tr. 2358, 5707).

effect a distributorship agreement and Cloverdale for a number of years sold to the plaintiff, Brosious. Cloverdale cancelled the Brosious account when Brosious refused to comply with a demand by Cloverdale that Brosious take on more territory, paint its trucks the prescribed color, and distribute only the products of Cloverdale. Brosious took his objections to the offices of the Pepsi-Cola Company. He was informed that it was not the policy of the Pepsi-Cola Company to tell their "franchise bottlers" what to do, but that when sales drop off in any particular territory it "steps in" and that it follows the policy of backing up its franchise bottlers and would do so in this case. From this Brosious tried to draw an inference of conspiracy to monopolize the whole-sale distribution of Pepsi-Cola. The court at page 102 said:

"It is the right, long recognized, of a trader engaged in a strictly private business, freely to exercise his own independent discretion as to the parties with whom he will deal. [citing cases]

"We conclude that the contract between the appellee corporations, independent of the interstate commerce, was not of itself offensive to the monopoly phase of the Sherman Act.

"Brosious upon meeting with the situation described, appealed to officers of Pepsi-Cola Company, and he contends that the treatment accorded him, together with the contract and the refusal of Cloverdale to sell to him, proves the conspiracy alleged.

"We are unable to make anything more out of the interviews with Pepsi-Cola officials other than that they do not interest themselves with distributor's business so long as he adheres to the contract and the volume of business is regarded by them as satisfactory. Such a policy is not unusual and is simply good business in a competitive economy. See Arkadelphia Milling Co. v. St. Louis S.W.R. Co., 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517. We are entirely in accord with the trial judge in saying 'It is my opinion that the evidence will not support a finding, that a conspiracy existed between the Cloverdale Spring Co. and Pepsi-Cola Company pursuant to which sales of Pepsi-Cola to the plaintiff were discontinued.', and we repeat that there is no evidence in the record of any monopolistic practice or unreasonable restraint of trade, interstate or intrastate, in the operation of the two corporations under the contract."

The relationship between Norge Sales and Lancaster, and the response that Norge Sales made to Manfree demands are analogous to the relationship between Pepsi-Cola Company and Cloverdale, and the response of Cloverdale to Brosious demands. The trial court was correct in ruling that no inference could be drawn from the fact that Norge Sales made no effort to interfere with Lancaster's decision not to have Manfree as a dealer, either by trying to compel Lancaster to sell Manfree, or by shortcutting the normal distribution pattern and selling Manfree directly.

b) The Evidence of Supposed Hale Pressure on Lancaster Was Not Admissible Evidence Against Any of the Appellees, and Even if Admitted Would Prove Nothing as to Said Appellees' Knowledge or Participation in the Alleged Conspiracy.

i. Statement attributed to John L. Mitchell of Lancaster.

One of the points relied on by appellants for reversal of the directed verdict in favor of Borg-Warner is the testimony of Bernard Freeman, the president of Manfree, concerning a conversation he purportedly had with John L. Mitchell of Lancaster in September or October of 1957 (Br. pp. 43, 89). Mitchell at the time of this alleged conversation was a salesman for Lancaster in the territory where U.S.E. is located.

Mr. Freeman testified that Mitchell had told him that Lancaster had had "pressure" from Hale not to sell to U.S.E., and that if Lancaster sold to U.S.E., Hale would not buy from Lancaster; and that the Lancaster organization held a meeting and decided not to sell to U.S.E. any longer (Tr. 5808-5809).

Mitchell was not called as a witness by appellants, nor was any portion of his deposition read into evidence, appellants relying solely on the hearsay testimony of their own chief officer, Bernard Freeman.

Upon an objection on the grounds of hearsay being interposed the Court ruled:

"Well, at this time the jury will have to await my further instructions as to whom this conversation shall apply to—which defendant, if any." (Tr. 5809)

In its memorandum opinion and order granting motions for directed verdict, the trial court ruled as follows:

"This hearsay declaration cannot be admitted in evidence against Norge Sales, absent either prima facie evidence of a conspiracy or prima facie evidence of Norge Sales' participation therein. Neither of these two prerequisites for the admission of this hearsay statement against Norge Sales has been established, nor can it be said that there is sufficient evidence from which the same could be reasonably or fairly inferred." (R. 1963)

The court also ruled in its memorandum opinion that this hearsay statement was not admissible against the defendant Hale for the reason that there had been no independent evidence establishing the participation in any conspiracy on the part of Hale. The court noted that "Such conversation is self-serving hearsay, conclusionary in nature, and it would be error to admit as to Hale, as there is no exception to the hearsay rule which applies to Hale." (R. 1972)

In making the rulings that it did in regard to the alleged statement of Mitchell, the trial court correctly applied well established rules governing the admissibility of hearsay evidence. This Court in *Flintkote Company v. Lysfjord*, *supra*, pp. 379-380, said with respect to the same kind of evidence:

"The only evidence that plaintiffs offered to prove defendant's 'yielding' and the joining by Flintkote of the conspiracy, other than the act itself of refusing to sell, was the respective testimony of Waldron and Lysfjord relating to (a) alleged admissions of Baymiller; and (b) alleged admissions of Ragland; and (c) the testimony of Lysfjord with respect to a telephone conversation directly with Krause."

A review of this testimony in *Flintkote* shows that the hearsay conversations there testified to by Waldron and Lysfjord, the plaintiffs, were similar in import to the statement herein attributed to Mitchell.³⁵ The positions of Mitchell in the present case

35. The report of the *Flintkote* decision quotes the testimony with respect to these conversations in footnotes 6, 7, 8, 9 and 10 at pp. 380 and 381. These generally related to statements made to the witnesses concerning pressure being applied to Flintkote by some of its dealers to stop dealing with plaintiffs.

and Krause in *Flintkote* are comparable in that Mitchell was an employee of Lancaster, one of the dismissed defendants at the time of trial. But, whereas Krause was an alleged officer and managing director of his company, Mitchell was shown to be only a salesman for Lancaster (Tr. 2594); also, Krause was named individually as a co-conspirator, Mitchell was not. With respect to the statement that Krause purportedly made to Lysfjord this court said at page 386:

"Conversation Number 3 involves no question of agency, for Krause was neither agent, servant nor employee of the defendant Flintkote. Krause was named as a co-conspirator in the amended complaint. Thus, if plaintiff had made a *prima facie* showing that there was a conspiracy and that Flintkote had joined the conspiracy, then the statements made by a co-conspirator, if made *during the existence of the conspiracy, and in execution of the common design*, were admissible against all conspirators. *Schine Chain Theatres v. United States*, 334 U.S. 110, 117, 68 S.Ct. 947, 92 L.Ed. 1245; *United States v. United States Gypsum Co.*, 333 U.S. 364, 393, 68 S.Ct. 525, 92 L.Ed. 746. [Emphasis the Court's]

"This conversation was introduced for the purpose of establishing that the act of termination was not equivocal, that it was an act in furtherance of the conspiracy, and that Flintkote had joined in that conspiracy. Excluding the evidence improperly introduced, no sufficient basis for the introduction of Conversation Number 3 was proved. Thus the foundation required to make the evidence admissible could only be established by the evidence itself. While much latitude is allowed in the order of proof establishing a conspiracy (as we have hereinabove discussed) the proponent of the evidence must still lay a proper foundation."

In the present case there is no independent proof of conspiracy apart from the inadmissible hearsay declarations of the alleged co-conspirators. As stated in *Flintkote, supra*, p. 386, with respect to the hearsay admission of Ragland:

"Here we have testimony introduced which goes to the very heart of plaintiffs' cause of action and to defendant's defense. Why did Flintkote terminate the contract? No reason was placed in writing. The only evidence (other than

the bare refusal to sell, which was equivocal) were the conversations”

The court went on to hold that the admission of Ragland's statement constituted prejudicial error.

The testimony of Bernard Freeman attributing to Mitchell a statement as to Lancaster's reasons for ceasing to do business with Manfree was properly held inadmissible against any of the defendants in this action because here, as in *Flintkote*, there was no independent evidence of conspiracy.

A further ground for not admitting this evidence against any of the appellees is that there was absolutely no foundation laid as to Mitchell's authority to make such a statement. Mitchell, being a salesman of Lancaster, held a position equivalent to Ragland in *Flintkote* who was a “promotional salesman”. This court in *Flintkote* said at page 385:

“The determination of whether or not Flintkote was to contract with the plaintiffs was passed ‘upwards’ seriatim by Ragland to Baymiller to Thompson to Harkins. Ragland had no executive duties for the corporate defendant, but was a representative at the lower echelon.

“There was an utter lack of proof of or any questioning seeking to establish Ragland's authority to speak on behalf of Flintkote, concerning the alleged incriminating statements of Krause, Howard, and Newport, threatening Flintkote with a boycott.”

As with Ragland, Mitchell had no executive duties for Lancaster, but was a representative at the lower echelon, and had no authority to speak for Lancaster concerning threats by Hale.

Further, this alleged statement of Mitchell so far as Borg-Warner, Norge Sales, and the other appellees are concerned, is irrelevant. Taken at its face value, and giving it every possible inference that it could support, it does not mention or implicate Borg-Warner or Norge Sales or any other appellee. The statement proves nothing as to the knowledge or participation of these appellees in the alleged conspiracy to boycott Manfree.

ii. Statement attributed to Ed Bonnet of Graybar Electric Company of Los Angeles.

Mr. Bert Green testified as a witness for appellants. This gentleman was in the coin-operated laundry equipment business in Los Angeles and during at least part of the period 1957 to 1964 handled the Norge line of laundry equipment, purchasing it from the southern California distributor of Norge products, Graybar Electric Company of Los Angeles (Tr. 5460).

Green testified that he was present at a meeting on June 10, 1959 at the Graybar office in Los Angeles at which Mr. Bonnet and Mr. Ash, (representatives of Graybar) were present together with Green and his son (Tr. 5506). With respect to this meeting, Green testified that Bonnet made a telephone call to Lancaster at Green's request, and after the call Bonnet told Green that he had been told that Lancaster didn't care if Graybar sold Green Norge appliances, but that Lancaster wouldn't sell to U.S.E. because it didn't want to "jeopardize a million dollar business with Broadway-Hale." (Tr. 5508-5509).

This testimony was double or triple hearsay. The witness Green testified to a hearsay statement of Mr. Bonnet of Graybar. This hearsay statement was further based upon the hearsay statement of some unidentified person in the Lancaster organization, which in turn relates to further hearsay about what Hale would or would not do if Lancaster sold U.S.E.

Green admitted that he was not in the same room with Bonnet when the alleged telephone conversation took place (Tr. 5508). Therefore, he was not in a position to testify with certainty that such a telephone call was actually made by Bonnet. He could only relate what Bonnet *said* took place. But, assuming that there was such a phone call to Lancaster, there was absolutely no way for appellees to test the truthfulness or accuracy of the statements attributed to Bonnet. Bonnet was not present in court; the person at Lancaster with whom he assertedly spoke was not even identified in a general manner—it could have been anybody from the president of the company to the janitor; and the basis upon which such a person concluded that the Hale's account would be

"jeopardized" if Lancaster sold to U.S.E. was absolutely beyond reach of inquiry.

Green was not a totally impartial witness in that he was a brother-in-law of the founder of U.S.E., Mr. Alpine, and also received a commission on merchandise which he bought for U.S.E. as its buying agent in Los Angeles (Tr. 5504-5505, Pl. Ex. No. 5105). Furthermore, he was thoroughly impeached as to his recollection of the purported phone call to Lancaster (Tr. 5525).

There could hardly be a more graphic illustration of the reason for the evidentiary rule against hearsay statements. As this court noted in *Flintkote, supra*, p. 382, "One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements."

Though there are exceptions to the hearsay rule which apply where there is a necessity for the hearsay evidence, (as where the declarant is dead or otherwise unavailable, coupled with circumstances which to some extent provide a substitute for the ordinary test of cross-examination) none apply to this evidence. (Appellants gave no explanation for not calling Bonnet as a witness.) Thus, Wigmore says of the circumstances which give rise to the hearsay exceptions:

* * * * * *

"§ 1422. *Second Principle: Circumstantial probability of Trustworthiness.*

The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. . . ."

5 *Wigmore On Evidence*, § 1422 (3rd Ed. 1940)

No such extra-judicial guarantees of the truthfulness of the hearsay statements attributed to Bonnet were established. More-

over, where there is hearsay upon hearsay upon hearsay, as is true in the present situation, the trustworthiness of the evidence becomes so uncertain that it must be excluded by the trial court.

Though the court excluded this evidence as to all the other defendants, it permitted it to stand as against Borg-Warner (Tr. 6854). However, in granting Borg-Warner's motion for directed verdict the trial court properly recognized that none of the hearsay statements testified to by Green involved Norge Sales or Borg-Warner (R. 1964).

The statement, taken at its face value, shows a decision by Lancaster not to sell U.S.E. There is not the slightest reference in all of this testimony to Norge Sales or Borg-Warner. Nor is there in it anything from which one could draw an inference that Norge Sales or Borg-Warner knew of any such Lancaster decision, or had any part whatsoever in its formulation. In short, this evidence, though admitted against Borg-Warner by the trial court, proved nothing against that company. The court correctly concluded that it was not such as to entitle the case against Borg-Warner to go to the jury.

As to the other appellees in this case, the statement of Bonnet was properly ruled inadmissible because of its hearsay character. The rules applied by this court in *Flintkote*, cited above with respect to the statement attributed to Mr. Mitchell, apply with equal or greater force to this hearsay statement of Bonnet.

c) The Meeting at the Villa Hotel in 1959 Concerning Transshipment Warranty Charges Does Not Show a Conspiracy to Boycott Plaintiffs, nor Can Any Inference of Conspiracy Be Drawn Therefrom.

For their case against Borg-Warner, appellants rely heavily upon inferences which they claim may be drawn from a meeting in April, 1959 at the Villa Hotel in San Mateo, California between representatives of Lancaster, Graybar of Los Angeles, and Norge Sales.

Present at this meeting were W. J. Lancaster and Gilbert Freeman of the Lancaster Company, Harold Bull and Eugene Schick of Norge Sales, and Ed Bonnet of Graybar Electric of Los Angeles (Tr. 2388, 2983, 5370). The two Lancaster witnesses testi-

fied with regard to the purpose of the meeting and the discussion that occurred (W. J. Lancaster, Tr. 2388-2392; Gilbert Freeman, Tr. 2715-2719). The representatives of Norge Sales also testified with regard to this meeting (Eugene Schick, Tr. 2983-2986; Harold Bull, Tr. 5380-5382 [deposition testimony read into evidence]). In addition to the oral testimony of the foregoing gentlemen, there was also documentary evidence, written at the time of the transshipment in question, showing the events which led to the Villa Hotel meeting and the reasons for that meeting (Pl. Ex. Nos. 4011, 4014, 4019, 4023, 4029).

All of this evidence, oral and documentary, is consistent, and shows that there was only one reason for the meeting at the Villa Hotel, that being to settle the question of whether Graybar should pay to Lancaster the warranty service charge of \$17.50 per appliance for merchandise which had been transshipped into the Lancaster distributorship territory at the request of Graybar's customer, Green.³⁶ This evidence is not contradicted by any other evidence whatsoever. Nor were any of the witnesses who testified with regard to the subject matter of this meeting impeached or discredited in any way.

From this evidence appellants seek to draw the inference that Norge Sales and Lancaster required Graybar to attend this meeting and there compelled it to acquiesce or join in the alleged conspiratorial boycott of Manfree. The fact finder is supposed to infer that Graybar sold appliances to Green's Distributors knowing that they were to be transshipped to U.S.E. until forced by Lancaster and Norge Sales to stop pursuant to a supposed conspiratorial plan to deny Manfree any Norge appliances (Br., pp. 90, 142-143).

It is clear that no such inference can validly be drawn from the evidence in this case. There is simply no evidence that supports

36. Though appellants refer to this warranty charge as a "fine" imposed by Norge Sales (Br. pp. 51, 90) this is not correct. The billing was not imposed as a penalty of any type. The amount reflected a built-in part of the purchase price to cover warranty costs. In effect, this warranty fund followed the merchandise to assure that the one-year warranty to the purchasing householder was honored.

appellant's theory. All of the evidence is to the contrary, as for instance Pl. Ex. No. 4023 which clearly shows that the Villa Hotel meeting was arranged at the request of *Graybar*, the company that was selling Norge appliances to Green for shipment to U.S.E. Thus, any suggestion that this meeting was arranged by Lancaster and Norge Sales to force Graybar to stop indirectly supplying U.S.E. with merchandise flies in the face of the established facts. Bull's telegram (Pl. Ex. No. 4029) arranging this meeting is dated eleven days after the letter from Bonnet to Bull suggesting that such a meeting be held (Pl. Ex. Nos. 4023, 4029).

Appellants can point to no contrary evidence. All they reply is that they "urged" that the meeting was held to discuss what to do about Manfree obtaining Norge appliances through Mr. Green and Graybar in Los Angeles" (Br., p. 143). While appellants may thus have formulated a *hypothesis* and a possible explanation of the facts by use of their own imagination, a jury could not be allowed to speculate that the real purpose of the Villa Hotel meeting was other than what all the evidence shows it to have been. A plaintiff cannot go to a jury on the basis of speculation, surmise or conjecture. *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F.Supp. 743, 746 (D.C., N.D. Cal., 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). Nor may forced and violent inferences be drawn. *Galloway v. United States*, 319 U.S. 372, 395 (1943). Mere speculation must not be allowed to take the place of probative facts. *Safeway Stores v. Farnam*, 308 F.2d 94, 97 (9th Cir. 1962); *Aluminum Company of America v. Preferred Metal Products*, 37 F.R.D. 218, 221 D.C., N.J. 1965).

Nothing can be inferred from the fact that the merchandise in question at the Villa Hotel meeting had been transshipped to U.S.E. on Green's order. No other instances of transshipment of Norge products into the Lancaster distributorship area were shown. The fact that Lancaster asserted its rights under the consumer protection program, proves nothing as to any issue in this case. This court has recognized the validity of warranty charges such as are involved here. *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.2d 446 (9th Cir. 1960).

All appellants have done is to postulate another *possible* explanation for the Villa Hotel meeting. Now they assert that the jury should have been allowed to speculate whether appellants' assertions, unsupported by any evidence, were correct. It is submitted that the facts in evidence with regard to this meeting dispose of any inference of conspiracy to boycott Manfree or U.S.E. just as surely as the facts in *Independent Iron Works v. United States Steel Corp.*, *supra*, disposed of the possible hypothesis of conspiracy urged by plaintiff in that case.

There is absolutely no evidence whatever that Norge Sales or Borg-Warner compelled or even suggested that Graybar stop sales to Green, or that either company prevented or attempted to prevent Graybar from continuing to transship Norge appliances to San Francisco for U.S.E. The uncontradicted evidence with respect to Norge Sales begins and ends with Mr. Bull getting the representatives of Graybar and Lancaster together to settle their differences with regard to payment of the warranty charges by Graybar.

There is no evidence from which a jury could infer that Graybar ceased selling to Green for transshipping on the command or directive of Borg-Warner or Norge Sales. The record does not disclose the reasons for Graybar of Los Angeles ceasing to sell to Green, if in fact it did so. The evidence shows only that Gilbert Freeman and Mr. Schick didn't learn of any further sales of Norge appliances to Green which were transshipped to San Francisco (Tr. 2727, 2729, 2985).

Appellants attempt to draw some inference concerning Norge Sales or Borg-Warner participation in the alleged conspiracy from the fact that in May 1959 Green placed an order for certain Norge appliances with Graybar in Los Angeles (Pl. Ex. No. 4035). Green followed this up with a letter to Norge Sales, dated June 16, 1959 enclosing a copy of the same order (Pl. Ex. No. 4034). Upon receipt of this letter Bull wrote to both Bonnet of Graybar (Pl. Ex. No. 4036) and Mr. Green (Pl. Ex. No. 4037) explaining that most of the order was out of stock. Of course, as already noted, Norge Sales did not sell to retailers in California. Therefore, the request of Green was referred to the independent distrib-

utor of Norge products in Green's area, Graybar. There was no evidence whatever that Bull's statement that the majority of the models ordered were out of production and no longer available was untrue. Nor was there any evidence that Borg-Warner or Norge Sales knew anything at all about this transaction between Green and Graybar of Los Angeles, except for Green's letter to Bull, Pl. Ex. No. 4034. Nor was there any evidence of knowledge by any representative of Borg-Warner or Norge Sales as to the final disposition of this order by Graybar. This is simply another of those transactions which is left hanging in the air, without any proof of connection with any of the appellees or any of the issues in these cases. Appellants again invite pure speculation by the jury as to any link between Graybar's dealings with Green, and either Borg-Warner, Norge Sales, or any other company. The trial court properly refused to allow such speculation. *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*.

d) All the Other Miscellaneous Activities of Either Borg-Warner or Norge Sales Relied on by Appellants to Establish a Prima Facie Conspiracy Are Without Probative Value.

Appellants' attempt to prove the alleged conspiracy by showing concerted refusals to deal was unsuccessful. The evidence presented a picture of non-parallel behavior by the appellees and alleged co-conspirators with respect to appellants. Beyond this, there was no proof that any appellee or alleged co-conspirator was conscious of the decision by any other company either to deal or not deal with Manfree. (Except, of course, where a manufacturer forwarded the Manfree request for merchandise to its local distributor, as in the case of Norge Sales and Lancaster.)

Appellants, therefore, sought to introduce other circumstantial evidence claimed by them to show at least some uniform or common business activities among appellees and other alleged co-conspirators. From such evidence appellants claim a jury could infer agreement, or at least a knowing commitment to a common plan, the necessary effect of which would be to boycott

them (See Br., pp. 71-74, 104-105, 110, 113, 156-159). The wide range of evidence offered by appellants covered every possible activity and communication that appellees or alleged co-conspirators engaged in during the period 1957-1964. To read appellant's brief one would conclude that everything these companies did was unlawful. The facts themselves present no such picture.

i. Use of manufacturer's suggested list prices by Norge Sales was lawful and created no inference of any antitrust violation.

Basic to appellant's theory of conspiracy to boycott discount stores is their claim that manufacturers, together with distributors and retailers, were attempting to fix prices through the medium of suggested list prices. Appellants charge that manufacturers compelled retailers to advertise at their suggested retail prices (Br., p. 105). This theory, or suspicion, of appellants was not borne out by the evidence.

Nowhere do appellants point to any evidence that Borg-Warner or Norge Sales ever compelled others, whether local distributors or retailers, to follow Norge Sales Suggested List Prices. Norge Sales did distribute price sheets to its distributors which contained suggested retail prices (Tr. 3010-3011, Pl. Ex. No. 1924). There is no violation of the antitrust laws in such a practice. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3rd Cir. 1963); *Susser v. Carvel Corporation*, 332 F.2d 505, 510 (2nd Cir. 1964).

This would be true even if retailers made a regular practice of following these Norge "suggested prices". Here, however, the evidence was that retailers frequently advertised and/or sold at prices other than those suggested by the manufacturers or distributors (Tr. 208-212, 1431-1433, 2000-2002, 3383-3385, 5029).

In the case of Norge products, the evidence shows that sometimes Lancaster followed the Norge suggested prices, sometimes it did not (Tr. 2828-2831). The record is simply barren of anything that suggests that either Borg-Warner or Norge Sales refused to allow the independent distributors handling Norge products to sell to retailers who did not advertise the Norge suggested

retail price. Appellants' suggestion that this was the situation is not in accord with the evidence (Br., pp. 104-105). While Lancaster had a policy of refusing cooperative advertising credits to a retailer unless his advertisements used either Lancaster's suggested price, a weekly term price, or no price (Tr. 2648), there was no evidence that Lancaster ever refused to sell Norge products to a dealer because he advertised prices lower than Lancaster's suggested prices. Nor was there any evidence that Borg-Warner, Norge Sales, or any other company participated in, or had knowledge of, the policy decision by Lancaster respecting allowance of advertising credits.

There is no evidence in the present case that retailers were coerced into using Lancaster suggested prices either as their advertised prices or their actual sales prices by Borg-Warner or Norge Sales. A dealer was under no obligation to advertise at Lancaster suggested prices in order to obtain the Norge product from Lancaster.

Furthermore, neither Borg-Warner nor Norge Sales is responsible for the business policies established by independent franchised distributors of Norge products. Such distributors are not agents of Borg-Warner or Norge Sales. *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943).

ii. The cooperative advertising program of Norge Sales, including the use of Key Account funds, was lawful, created no inference of conspiracy to restrain or monopolize trade, and was not probative of any issue in the case.

Norge Sales had a cooperative advertising program which included various types of funds established by Norge Sales for use by distributors in connection with advertising and promoting Norge Products (Tr. 2672). Co-op funds were made up of money contributed by Norge Sales coupled with distributor matching funds based upon a percentage of the total purchase price paid by the distributor for products ordered from Norge Sales (See Pl. Ex. No. 1924, and Pl. Ex. for Id. No. 53). Norge Sales provided distributors, like Lancaster, with periodic funds designated as Key Account Advertising Funds. These were used by the distributors

in the same fashion as other Co-op funds, the distributor making claims against the funds for part of the cost of retailer advertising. Retail dealers participating in such programs were selected upon the recommendation of distributors (Tr. 2672-2673). These retailers still paid part of their own costs of advertising Norge products. The distributor in making a claim for payment of advertising allowances simply allocated part of its claim to the key account fund, and part to the In-Market Fund (Pl. Ex. Nos. 4101, 4102).

Appellants' elephantine labor with respect to advertising allowances produced a mouse. Nothing in all the testimony elicited from the Norge Sales, Lancaster, and retailer witnesses or in all the documentary evidence offered by appellants with relation to the creation and use of advertising allowances tended to establish either directly or by inference any conspiracy among appellees and alleged co-conspirators to restrain trade or monopolize the sale of major household appliances and television sets (See Tr. 2412-2422, 2670-2697, 2936-2941).

It would be of little assistance to the court, and it would unduly prolong this brief, to review in detail this mass of evidence. It was all irrelevant to the issues of this litigation. Appellants assert that this material shows favoritism toward certain retailers such as Hale, ignoring that their complaint is based upon alleged refusals to deal and inability to obtain certain brands of appliances and TV's, and not on alleged Clayton Act discriminations in allowances. Moreover, there is no evidence that Borg-Warner or Norge Sales used advertising allowances as a coercive instrument to force retailers to do their bidding. There is nothing in all of this material that suggests that Norge Sales ever attempted to compel distributors or retailers to advertise or sell Norge products only at the retail prices suggested by Norge Sales by withholding or threatening to withhold advertising funds from non-complying companies.

Any claim to the contrary by appellants (see for instance Br. pp. 105, 159) is nothing more than the product of pure speculation and suspicion, unsupported by any evidence.

It is submitted that evidence in this case relating to the key account advertising funds established by Norge Sales and administered by its distributors such as Lancaster proves nothing, nor can any valid inferences of any conspiracy to boycott appellants be drawn therefrom. Appellants' speculation that Hale did not use all of the advertising money that was available to it from Lancaster under the 1957 key account advertising program because Lancaster was selling to Manfree during a five month period (May-September) of that year is one of the flagrant examples of the liberties that appellants frequently take with the record. They characterize this as a "refusal" by Hale to use these funds (Br., p. 38). The evidence simply does not suggest a "refusal" to use the funds (Tr. 2899, Pl. Ex. No. 644). Any one of a hundred equally valid possibilities suggest themselves to explain Hale's failure to use the full amount of advertising funds under the key account program.

Further, Pl. Ex. No. 4098G shows that a similar situation occurred in May 1958 with respect to the accounts of Macy's and Breuner's. Yet appellants don't claim that these were "refusals" by these accounts to use advertising funds. Breuner's is not claimed to be a party to the alleged conspiracy to boycott appellants; and, of course, Lancaster hadn't dealt with Manfree for seven months prior to May, 1958. Yet key account advertising funds were not used by these accounts. Why? The evidence is inconclusive, just as it is in the case of Hale in 1957. The jury could draw no reasonable inference from such evidence.

iii. The manufacture of special models of Norge appliances by Borg-Warner, and their use by Norge distributors proved nothing.

The fact that Borg-Warner manufactured special models of various home appliances is without probative value (Tr. 2960). These were variously known as "MP models", "Key account models", "deviation models", or "special models" (Tr. 2960, 2701, 2704-2706). The evidence is uncontradicted that a dealer did not have to be a "key account" dealer to get these models (Tr. 2701).

While Hale purchased some of these special models from Lancaster, so did other dealers (Tr. 835-837).

There is no evidence that Borg-Warner or Norge Sales made any limitation or ruling as to the dealers entitled to purchase these appliances. Nor is there any evidence that they were used in any fashion to coerce dealers to abide by any Borg-Warner or Norge Sales policies.

The only evidence with respect to the manner in which *Lancaster* employed these special models is shown in Pl. Ex. No. 4089. This exhibit shows that in April 1959 Lancaster proposed to use special freezers to promote more sales of Norge products with old accounts, and to interest new accounts in the entire Norge line.

Clearly, such evidence falls short of proving, even inferentially, any conspiracy to boycott appellants. It adds nothing to appellants' case. Even if "favoritism" were an issue in this litigation, this evidence does not prove the existence of favoritism.

iv. Membership in the NEMA and AHLMA Trade Associations and the activities of these associations proved nothing and created no inference of the alleged conspiracy.

Borg-Warner and Norge Sales were members of the American Home Laundry Manufacturers Association [AHLMA]. Harold Bull, the vice-president in charge of sales of Norge Sales, was on the Board of Directors of AHLMA (Tr. 5392-5393). Other appellee manufacturers were also members of this trade association, including General Electric, Hotpoint, Whirlpool, Maytag and General Motors (Frigidaire Division) (Tr. 3483-3485, 2552-2553, 5392-5394). The Association was divided into many committees such as an engineering committee, public relations committee, and committees on foreign freight and ocean rates, industrial relations, and home economics (Tr. 5394, 3501-3502).

Among the projects that this association undertook was the publication of an AHLMA Code of Ethics (Tr. 3485-3487, Pl. Ex. No. 2). Lancaster, as a distributor of Norge home laundry appliances received a copy of this booklet (Tr. 2656). Lancaster required that its dealers comply with F.T.C., AHLMA, and Better Business Bureau recommendations with respect to advertising in

order to qualify for cooperative advertising funds (Tr. 2653, Pl. Ex. No. 4355).

AHLMA also has prepared statistical material with respect to home laundry equipment (Tr. 2551, 5394).

This is the sum total of evidence in this case with respect to Borg-Warner or Norge Sales and their activities in, or relationships with, or knowledge of AHLMA. There is nothing in such evidence that gives rise to any logical inference of conspiracy to boycott appellants.

Borg-Warner was also a member of the National Electrical Manufacturer's Association [NEMA] as were other manufacturers of electrical appliances (Tr. 5410-5411). This organization also engaged in preparation of statistical studies and analyses (Tr. 2551, 5391-5392). These reports or studies dealt with product specifications, and also computations of total industry sales of various electrical appliances by area (Tr. 2551, 4262, 5391-5392). Manufacturer members could use NEMA reports of total sales to compute their individual shares of any given market. General Electric did this, so did Norge Sales. Distributors getting these "penetration reports" would get only their own product percentages and not those of any other company (Tr. 5281-5286, 2800-2805, Pl. Ex. Nos. 149, 5047, 168-173).

Representatives of various manufacturers attended meetings of NEMA (Tr. 5403-5404). The identity of persons attending specific meetings was never established by competent evidence. From the simple facts of membership plus attendance at some meetings, plus receipt of statistical information, appellants would find evidence of conspiracy (Tr. 3032). There is nothing more in the evidence with respect to NEMA meetings or activities.³⁷ This evidence, like evidence concerning AHLMA, was without probative value and did not constitute any circumstance from which appellants' asserted conspiracy could be inferred. *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563 (1925).

37. Appellants offered a mass of documents in connection with AHLMA and NEMA matters which were not admitted in evidence. (See part B.2.(3) (4) of this brief, and Sp. of Err. pp. li-lv.) The documents so offered were properly rejected for lack of foundation with respect to genuineness and authenticity, hearsay, irrelevancy and immateriality.

Many other organizations came under appellants charge that membership therein by various of the appellees or alleged co-conspirators gave rise to inferences of conspiracy. Borg-Warner and Norge Sales were not members of any of these organizations, nor was there any evidence that either of said companies had knowledge of, or any interest in, the activities of such associations. These included the Better Business Bureau of San Francisco (of which U.S.E. itself was a member Tr. 6054); E.I.A. (Br., p. 74); Northern California Electrical Bureau (NCEB) (Br., p. 64); Retail Furniture Dealers Association (Br., p. 64); and Credit Managers Association of Northern California (Br., p. 107).

Lancaster was a member of the NCEB during some part of the period 1957-1964 (Tr. 2814); the Credit Managers Association (Tr. 2408); and the Gas Appliance Society (Tr. 2809). Appellants were unable to produce any evidence from which a jury might infer a conspiracy because Lancaster and other appliance dealers or distributors belonged to these organizations. Appellants established only that Freeman of Lancaster had on occasion met representatives of competitors (Tr. 2811, 2813-2815). From such innocent and meaningless bits of evidence appellants have fashioned their aberration of a conspiracy to boycott them.

B. The Trial Court Properly Excluded Certain Documentary Evidence Offered by Appellants Against Appellees Borg-Warner and Norge Sales.

Appellants attempted to construct a picture of an elaborate scheme whereby appellees and other manufacturers, distributors and retailers of major home appliances and television sets were alleged to be involved in a conspiracy through the medium of suggested list prices, cooperative advertising programs, and various trade association meetings and activities, and pursuant to which discount stores were boycotted. Literally hundreds of unrelated and unexplained exhibits were offered by appellants in order to prove the existence of this hallucinatory conspiracy. These exhibits individually proved nothing; and taken collectively, simply proved the rule that the whole is no greater than the sum of its parts.

The following discussion is limited to those exhibits which were offered by appellants to prove the participation of Borg-

Warner and Norge Sales in any alleged conspiracy. (Sp. of Err. VB. pp. v-xiv)

1. GENERAL PRINCIPLES GOVERNING THE ADMISSION OR EXCLUSION OF THE OFFERED DOCUMENTARY EVIDENCE.

One of the recurring reasons for the trial court's exclusion of proffered documentary evidence was lack of preliminary foundation. Whether or not a sufficient foundation has been laid for the admission of documentary evidence is a matter addressed to the discretion of the trial court. *Metropolitan Life Insurance Co. v. Armstrong*, 85 F.2d 187 (8th Cir. 1936).

"Foundation" with respect of writings has two meanings as applied by the Federal Courts. First, it relates to preliminary proof of authenticity and genuineness; second, it also relates to the admissibility of a properly authenticated document against a party as an adoptive admission. As to the first foundation requirement, federal courts require that where a document is not admissible as a memorandum or record made in the regular course of business, its authenticity and genuineness must be established in accordance with familiar rules pertaining to the authentication of private writings in general. *Standard Oil Company of California v. Moore*, 251 F.2d 188, 218 (9th Cir. 1957). The requirement of authentication means that the proponent of the document must introduce evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or the establishment of such facts by any other means provided by law. *California Evidence Code*, §1400.

Federal courts have consistently required such preliminary foundation for the admission of documentary evidence, whether private or public writings. See *Magee v. McNany*, 95 F. Supp. 675, (U.S.D.C., Pa. 1951); *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418, 422 (2nd Cir. 1959); *Yaich v. United States*, 283 F.2d 613, 616-617 (9th Cir. 1960). California courts require the same type of preliminary foundation for documentary evidence. *Fishel v. F. M. Ball & Co., Inc.*, 83 Cal. App. 128 (1928); *Gould v. Samuels*, 132 C.A.2d 459, 470 (1955).

The requirement of proof of authenticity of a document is not an idle formality of the law. Special attention must be given to

authentication of documents before permitting them to go to the jury. Most documents purport on their face to be of a certain person's authorship. There must be external evidence of this authorship apart from the mere existence of the document. The fact that a document has been produced from the possession of a party opponent, especially where the document is purportedly signed by some third person, is not sufficient to establish its genuineness. 7 *Wigmore On Evidence*, §§ 2129, 2130, 2160 (3rd Ed. 1940).

With respect to almost every one of the exhibits hereinafter mentioned appellants failed to lay any foundation of authenticity or genuineness. Appellants simply proved, or it was stipulated, that the documents came from the files of a particular appellee or alleged co-conspirator. There was either no showing that the document was what it purported to be, or no showing of the identity of the author, or no showing of the writer's authority to speak for his employer. Sometimes all three elements of foundation were missing.

This leads us to the second definition of the term "foundation." Even had the genuineness of the various documents been established, it was necessary for appellants to show that they were admissible against appellees as adoptive admissions upon some theory of agency. Thus, as noted in *Standard Oil Company of California v. Moore, supra*, p. 218:

"Extrajudicial admissions of a party-opponent are receivable as exceptions to the hearsay rule. In our case, the documents consist of the writings of employees and agents of the companies against which, at a new trial, they would be produced. To obtain their reception as admissions, it must therefore be made to appear that the statements in question were made or acted upon under circumstances which require appellant corporations to accept responsibility for them as admissions."

Thus, as to writings purportedly written by employees of Borg-Warner or Norge Sales and offered against said appellees, appellants had the initial burden of showing the writer's authority to make statements on behalf of said appellees; or alter-

natively, proving that Borg-Warner or Norge Sales acted upon or adopted or ratified said statements. *Standard Oil Company of California v. Moore, supra*; see also *Arnold v. Thompson & Spear Co.*, 279 Fed. 307, 311 (1922). No such evidence was presented by appellants.

Throughout the trial all appellees made continuing objections to these and other documents offered by appellants on grounds of immateriality and irrelevancy. Although these grounds for exclusion might also be deemed to involve foundation, they will be mentioned separately where appropriate. With this brief review of the principles involved, we proceed to review the particular documents relating to Borg-Warner or Norge Sales which appellants claim were erroneously and prejudicially excluded from evidence.³⁸

2. THE RULINGS OF THE TRIAL COURT IN STRIKING OUT OR EXCLUDING CERTAIN WRITINGS OFFERED AGAINST APPELLEES BORG-WARNER OR NORGE SALES WERE PROPER, AND IN ANY EVENT NOT PREJUDICIAL.

(1) Exhibit Number 9024.³⁹ (Sp. of Err. pp. v-vi; Br. pp. 140-141).

This exhibit and the related testimony of the witness Mittelman concern a statement purportedly made to Mittelman by Mr. Arro, a classified advertising salesman for the San Francisco Examiner. It has nothing whatsoever to do with Borg-Warner or Norge Sales.

Mittelman (produced as a witness for appellants) on direct examination testified that Arro had told him that the Examiner wouldn't take a U.S.E. classified ad "because they don't want to put it in because the downtown stores don't want U.S.E. in the newspaper." (Tr. 2110). This alleged conversation between Mittelman and Arro was objected to by counsel for Borg-Warner on behalf of all defendants on several occasions upon the grounds that there was no showing of authority for Arro to speak for the

38. The excluded documents are discussed in this brief in the same order in which they appear in appellants' Specification of Errors.

39. The reference to "exhibit numbers" in this portion of the brief refers to "plaintiffs' Exhibit Number for Identification" unless otherwise specified, since none of the subject exhibits were admitted into evidence. Exhibit 9024 was offered and admitted as a Borg-Warner exhibit and subsequently struck out.

Examiner (Tr. 2107, 2108, 2109). The court overruled all these objections (Tr. 2109). Immediately following this testimony of Mittelman counsel for Borg-Warner moved to strike it from the record, as did counsel for Hale. The court at that time made no ruling on these motions (Tr. 2111-2114).

Counsel for appellants then embarked on a series of leading questions concerning this purported conversation between Mittelman and Arro, and over objections of various counsel for appellees, including Borg-Warner's counsel (Tr. 2117, 2119), used Exhibit 9024 for the asserted purpose of "refreshing the witness' recollection"; and by this device was able, after much prodding, to elicit from the witness that Arro had specifically mentioned to him the Emporium, Macy's, Hale and Roos/Atkins (Tr. 2121-2122; 2162).

Counsel for Borg-Warner in cross-examining Mittelman offered in evidence Exhibit 9024 (Tr. 2164). It was offered only as to Borg-Warner, and the record shows that said exhibit was used solely for the purpose of impeaching Mittelman's testimony with respect to what Arro had told him (Tr. 2166, 2171-2173).

The motion to strike the Mittelman testimony was renewed by appellees at the conclusion of the trial (Tr. 6622, 6628-6629). This renewed motion to strike included the memorandum of the conversation, that is, Exhibit 9024 (Tr. 6629). The court subsequently struck the entire testimony of Mittelman with regard to this Arro conversation upon the grounds that it was hearsay, or even hearsay upon hearsay; and upon the further ground that there was no evidence of any authority shown for Arro's statement, and further, that any statement even by an authorized representative of the Examiner could not bind any of the appellees since there was no evidence that the San Francisco Examiner was a co-conspirator in a conspiracy (Tr. 6788, 6855).

Appellants' contention is that any objection to admission of Exhibit 9024 was waived by counsel for Borg-Warner.⁴⁰

40. Of course, counsel for Borg-Warner could not waive the objections of the other defendants which were properly raised at the time the exhibit was offered.

Appellants cite cases standing for the proposition that objections to incompetent evidence may be waived. However, all of these cases are factually distinguishable. They do not deal with the situation of an exhibit used only for impeachment, where the testimony impeached has been struck out.

In California when a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him. *Albert v. McKay & Co.*, 174 C. 451, 456 (1917).

Also, when a document is used to refresh the memory of the witness, as Exhibit 9024 was used by appellants, the document cannot be admitted as independent corroborating evidence of the witness' testimony. *Hawkins v. Sanguinetti*, 98 C.A.2d 278, 284 (1950). As the court noted in *Hawkins*, "to permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit."

Thus, Exhibit 9024 could not be used as evidence of the truth of the facts stated therein to corroborate the testimony of Mittelman. Its only use as independent evidence was as impeachment. Of course, when the court struck out the entire testimony of Mittelman with respect to the Arro conversation, Exhibit 9024 lost any impeachment value. Therefore, the trial court properly struck it from evidence also. In any event, the action of the trial court was not prejudicial inasmuch as appellants could not rely upon this memorandum to prove the statements contained in it. *Albert v. McKay & Co.*, *supra*.

(2) Exhibit Number 431. (Sp. of Err. pp. vii-viii; Br. pp. 72-73, 82, 141-142, App. B).

The exhibit itself consists of two distinct parts: the first being an inter-office communication purportedly from J. S. Sayre of Norge Sales to other employees of the same corporation, dated July 15, 1960, in which Sayre refers to an attached memorandum, and says he will discuss it at a coming meeting. The authenticity of this part was not established. Sayre was not questioned about this memo.

The second part is the attached memorandum entitled "Executive Management Responsibilities In Marketing Practices." Appellants made no attempt to establish any foundation of the genuineness or authenticity of this memorandum. The author's name does not even appear on the document and there was no testimony in this regard. Its only identification is from Sayre's memorandum that it is a paper which was "*handed out*" at a NEMA meeting.

What the evidence *does not* show is significant. Thus, there is no evidence of: (a) the author of the "Executive Management" memorandum; (b) its distribution; (c) its use—whether the subject of a speech, general discussion, or just a "hand out"; (d) the actual conduct of a NEMA meeting on July 14, 1960—no minutes or testimony proving such a meeting were ever produced; (e) Sayre's attendance at any such meeting; (f) the attendance of any representative of any of the appellees or alleged co-conspirators at such a meeting; (g) the topics discussed at such a meeting, or what was said by anyone present; (h) the receipt of a copy or knowledge of the existence of the memorandum by anyone other than Sayre; (i) any action taken by Sayre or any other Norge Sales employee with respect to the comments contained in the memorandum; (j) any action taken by any other member of NEMA with respect to such memorandum; (k) any discussion by Sayre or any other Norge Sales employee with *anyone* showing either agreement or disagreement with the suggestions contained in the memorandum; (l) any similar discussion by any representatives of any of the other appellees or alleged co-conspirators with anyone.

Appellants' sole foundation for admission of this document is that it was found in the files of Norge Sales. The reason for the rule requiring a foundation of genuineness and authenticity before written material can be admitted into evidence is well illustrated by this document. Appellants would have Norge Sales vouching for the authenticity of the unidentified memo, and would also imply said company's indorsement of the statements contained therein, simply because it is attached to an unauthenticated paper purporting to be an inter-office communication of an officer of

Norge Sales. This under the above-cited authorities is simply not sufficient for its admission.

The objection of lack of foundation was properly raised by counsel for Borg-Warner at the time said exhibit was offered in evidence (Tr. 2545, 6468) and the trial court properly excluded it on this ground.

Beyond this, however, the exhibit was properly denied admission because it was irrelevant to any of the issues of this case. Contrary to appellants' assertion that this document shows an attempt by certain of the appellees to establish "a fixed and rigid distribution system in the United States, based in part upon maintenance of list price," the memorandum simply reflects the view of some unidentified person that the appliance industry was in a decline, and his opinion of what might be done to correct this. The memo does not contain any suggestion that manufacturers *agree among themselves* concerning prices to be charged for household appliances. Nor, contra to what appellants claim, does it suggest that manufacturers establish published "list prices" as the advertised retail price (Br. p. 142).

Appellants' interpretation is based upon an out-of-context misreading of paragraph 2 of the memorandum. This paragraph states:

"2. An area of opportunity to take corrective measures could be activated if manufacturers would follow the following simple rules applied to their distribution pattern with exclusion of government housing:

"a. Establish distributor prices and dealer prices to be used with all retailers regardless of type or volume, and in no instance waiver from these established prices. (This recommendation is only living up to the laws of the land and conforming to Robinson-Patman and the Clayton Act.) ..."

A fair reading of this paragraph does not permit the interpretation urged by appellants that manufacturers were to agree upon prices or price formulas to be charged for their appliances.

The unknown author of this memorandum says only that in his opinion manufacturers should charge their customers the same price for any given product whether the customer is a large or

small volume buyer, and regardless of the type of customer. Thus, he urges that where a manufacturer sells to a retailer, there be no distinction made as between furniture stores, department stores, discount stores, or other categories of purchasers, and that each manufacturer obey the law and avoid discrimination in price between competing purchasers of commodities of like grade and quality. The author urges that a retailer such as Manfree pay the same price for any given model of appliance as a larger volume dealer (such as Hale)—*thus encouraging market competition, not restraining it*.

The exhibit was properly excluded as irrelevant.

(3) Exhibits Numbers 3006 and 3007. (Sp. of Err. pp. vii-viii).

Both of these exhibits relate to NEMA matters. The first, 3006, purports to be minutes of a NEMA Consumer Products Division meeting of January 6, 1960. This was relied upon by appellants to establish the persons present at the alleged NEMA meeting in July 1960 (Tr. 2543, 6469). No foundation was laid for the admission of this document whatsoever. No witnesses were called or examined as to the execution of this document. The face of the document purports to be minutes, but there is no evidence that these so-called minutes correctly set forth the events of the meeting, if there was such a meeting. Lacking any proper foundation for authenticity, the court properly excluded this document.

Further, the court properly excluded it upon the basis of irrelevancy since it is obvious that minutes of a January meeting cannot either directly, or by any inference, establish who was present at a meeting six months later in July 1960. The content of the document also reveals that it is irrelevant to any issue in this litigation. It does not, contra to what appellants say (Sp. of Err., p. viii), *direct* members to accelerate statistical reports. It states only that members requested a study be made of ways to accelerate reporting of statistical data so as to permit the issuance of summaries with a shorter time delay. Further, appellants' description of this document suggests that NEMA statistical reports show market percentages of all reporting companies. The document does not show this, and it is not the fact. The document on its face is irrelevant, it cannot be twisted into something sinister by

reading words into it that aren't there. It was properly excluded.

Exhibit No. 3007 was excluded upon the same basis. Appellants in their opening brief refer to 3006 and 3007 and numerous other exhibits and claim that they establish the scheme of a "fixed and rigid market system" imposed by manufacturers, and also establish the "motive of said companies to aid and assist in the control of retailers of entry into the San Francisco market" (Br., p. 141). It is submitted that it is utterly impossible for any reasonable person to read Exhibit 3007 as showing or even inferring a scheme such as dreamed up by appellants. Exhibit 3007 is simply a letter memorandum written by Mr. Joseph F. Miller, shown on the letterhead to be the managing director of NEMA, and addressed to the Board of Directors of the Consumer Products Division of NEMA. It states that the Board of Directors of NEMA was confused about the proposed NEMA standard for computing refrigerator capacity and had voted to request the General Engineering Committee of the Household Refrigerator and Freezer Section to review the NEMA standard so as to eliminate all reference to "gross volume." The writer also suggests a sticker to show that a refrigerator is measured by NEMA standards.

This document proves nothing with respect to the existence of a conspiracy to restrain or monopolize trade pursuant to which there was a boycott of Manfree and U.S.E. It is patently irrelevant. As much as appellants would like to have this court believe otherwise, there are legitimate areas of communication among competitors in an industry. *Maple Flooring Mfrs. Assn. v. U.S.*, 268 U.S. 563 (1924). It is submitted that subjects such as elimination of misleading descriptions of product capacity are within the boundaries of legal communication. Such communications do not tend to restrain trade. Rather, they benefit the public, and form an important part of trade association work. Exhibit 3007 was therefore properly excluded on grounds of irrelevancy.

(4) Exhibits Numbers 3022, 3024, 3026, 3029, 3030, 3032, 3036, 3037. (Sp. of Err., pp. ix-x).

This material, in one way or another relating to AHLMA, is of various kinds, including inter-office memorandums of Norge

Sales, statistical data from AHLMA, letters and a memo purporting to be from the president of AHLMA.

With reference to all of the above numbered documents, appellants cite *Standard Oil Co. of California v. Moore*, *supra*; and *Continental Ore Corp. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) (Br. p. 142). As shown earlier in this brief, this court in the *Moore* case expressly required proper foundation for the admission of documents. *Continental Ore* is simply inapposite to the question of foundation, since nowhere in that decision is the necessity for establishing genuineness and authenticity of documents discussed. Appellants ignore foundation and argue that the content of these documents proves the alleged conspiracy.

A review of this assorted collection of documents reveals that there is no basis for appellants' claim that these documents, individually or collectively, prove or tend even by inference to prove that manufacturers of major home appliances gathered at AHLMA meetings for the purpose of discussing enforcement of a single price system and a fixed and rigid distribution market throughout the United States (Br., pp. 141-142).

Counsel for Borg-Warner objected to the offer of Exhibit 3022 upon the grounds of lack of foundation and it was excluded from evidence on that ground (Tr. 3039-3041). Appellants' counsel conceded that there had been no evidence as to the foundation of this exhibit (Tr. 6472), and argued that it was admissible without the need for further foundation because it came from files of Norge Sales (Tr. 6473). Significantly, counsel for appellants has failed to cite any authority for this proposition.

Exhibit 3022 shows only the personal opinion of an employee of Norge Sales (his position with Norge Sales was never identified or described) as to the value of representation at trade associations. Contrary to appellants' statement (Sp. of Err., p. ix), Exhibit 3022 does not discuss the desirability of *jointly* controlling production in order to control market conditions. It simply notes that in the opinion of Mr. Homer Travis, Chairman of the Board of Directors of AHLMA, appliance manufacturers should keep close control of their inventories.

Exhibit 3024 is AHLMA statistical data concerning factory sales for the month of July, 1959, and the first seven months of 1959. Statistical computations of this type by trade associations are not in violation of the antitrust laws unless used for the purpose of monopolizing or restraining trade. *Maple Flooring Mfrs. Assn. v. U.S.*, *supra*; *Cement Mfrs. Protective Assn. v. U.S.*, 268 U.S. 588 (1924). No illegal purposes were here shown. No individual company figures are published in this document. (Nor are they in any other NEMA or AHLMA statistical survey.)

The observations made with respect to Exhibit 3024 apply with equal force to Exhibit 3036, which is a booklet entitled "AHLMA Indicators," and contains only a series of graphs showing industry-wide relationships between inventories and factory sales for various home appliances. Participants in the statistical study are shown, but no figures appear for individual companies.

Appellants' treatment of Exhibit 3026 is a particularly striking example of their frequent misinterpretation of documents. A comparison of appellants' description of what this document contains (Sp. of Err. pp. ix and lv) with the document itself reveals gross inaccuracies by appellants. For instance, appellants describe this document as "commenting on the association's [AHLMA] 'voluntary code covering advertising practices' and *its* decision not to seek Federal Trade Commission review or approval of the program."

In fact, Exhibit 3026 purports to be a letter from Mr. Guenther Baumgart to Mr. Bull of Norge Sales, reporting on a *presentation made by a Mr. Forrest A. Hainline, Jr.*, to the AHLMA Board of Directors. Baumgart says in the letter that Hainline reviewed his *personal activity* in attempting to determine whether or not something could be done on an industry basis to eliminate doubtful advertising practices; that at Mr. Hainline's invitation, meetings of "counsel for a number of companies" were held (the identity of the counsel attending such meetings is not shown either in Exhibit 3026 or by any other means), and as a result thereof Hainline was asked to report to AHLMA's Board of Directors

and to recommend that AHLMA undertake the development of a voluntary code of advertising practices. Baumgart's letter further states that Hainline reported that it was the consensus of opinion among the *counsel* at one of these meetings that the Federal Trade Commission should not be approached on the subject of trade practice rules.

To maintain that this exhibit tends to prove a conspiracy among manufacturer members of AHLMA to "establish a fixed and rigid market system" pursuant to which there was a boycott of discount houses in general, and appellants in particular, requires the wildest stretch of the imagination; and even more, a distortion of what the document actually says. The court properly excluded this document as irrelevant.

Exhibits 3028 and 3029 are not accurately described by appellants (Sp. of Err., p. ix).

Exhibit 3028 purports to be a memorandum from Guenther Baumgart to various individuals including Mr. Bull and Mr. Ruff of Norge Sales. By this memorandum, dated July 5, 1960, Baumgart forwards what purports to be a *draft* of the minutes of a meeting of the AHLMA Standards Committee on June 30, 1960. He asks the addressees to inform him whether or not this draft accurately reflects what happened "during that part of the meeting for which you were present." There was absolutely no foundation with respect to the genuineness or authenticity of this document and it was properly excluded on this ground. Furthermore, neither Guenther, nor Bull, nor anyone else was examined with respect to this document. It was incompetent hearsay as to all appellees and objection on that ground was properly sustained (Tr. 6477).

The document was also properly excluded on the ground of irrelevancy. The content of Exhibit 3028 merely reflects a discussion of the pros and cons of a proposed AHLMA standard for laundry appliances, and a question as to whether any such AHLMA standard should be based upon performance, or upon machinery specifications.

Exhibit 3029 is referred to by appellants as an AHLMA document, but it clearly purports to be an inter-office memorandum of Norge Sales having reference to an AHLMA Board of Directors meeting. No foundation was laid for admission of this document. Neither Bull, nor Sayre, nor anyone else was questioned with respect to its authenticity. Further, the content shows the document was irrelevant to any issue here involved. It shows mainly that there was disagreement among members of AHLMA as to the adoption of AHLMA standards for rating washing machines and dryers — the result being creation of a new committee for further study of the laundry industry's requirements in the area of product specifications.⁴¹

Exhibit 3032 purports to be an AHLMA letter from Guenther Baumgart relating to the exchange of specification sheets. Aside from lack of foundation, the document is absolutely without probative value. The exchange of specification sheets does not even remotely relate to the issues of this litigation. If anything, documents of this sort tend to prove that the NEMA and AHLMA trade associations were used for lawful rather than unlawful purposes. The trial court properly excluded this exhibit.

Exhibit 3037 is referred to in appellants' Specification of Errors and appellants' opening brief but is nowhere described. It appears to be an inter-office memorandum from Bull to a Mr. R. S. Bradley dated April 17, 1963 concerning AHLMA dues and the forthcoming AHLMA budget. There was no foundation laid for its admission. The exhibit was never identified by Mr. Bull, nor was there any other authentication of the document. Mr. Bradley is nowhere identified. In any event, the document is absolutely meaningless so far as any of the issues of this litigation are concerned and the court properly excluded it.

41. Appellants' statement that this document shows exchange of information about "relative shares of markets" (Sp. of Err., p. ix) is probably based on the statement in the memorandum that the writer learned that Speed Queen accounted for 25% of the industry's sales of wringer washers, Maytag 30%, and his deduction that Speed Queen, Maytag and Norge account for 65% of industry brand sales in 1959. Such material is incompetent hearsay as to all appellees, and in any event has absolutely no connection with the conspiracy alleged by appellants.

(5) Exhibits Numbers 1922, 1923, 3095. (Sp. of Err. p. x).

All of these exhibits are generally described as Lancaster price sheets. Exhibit 1922, consisting of approximately 130 pages, was first offered through the witness W. J. Lancaster (Tr. 2401-2405). This exhibit together with No. 1923 was again offered through the witness Gilbert Freeman (Tr. 2659-2664). The record as to these exhibits and what they mean is hopelessly confused. (See the colloquy between court and counsel, Tr. 6540-6563.) A similar Lancaster price sheet numbered 3095 was offered through the witness Eugene Schick (Tr. 3019).

All that was clearly established concerning these exhibits was that they were Lancaster company documents. The witnesses W. J. Lancaster and Gilbert Freeman testified that these sheets reflected some sort of dealer classification, but the record shows that appellants' counsel did not pursue the inquiry or in any manner establish the meaning, purpose, or use of the classification system. The trial court properly excluded all of these exhibits upon the ground of lack of foundation (as to materiality and relevancy). Appellants argue that these documents show full notice and knowledge of Borg-Warner as to Lancaster pricing policies and activities in San Francisco; and also, prove control of Lancaster by Borg-Warner in matters of pricing and advertising by retailers (Br., p. 143). However, appellants never get around to explaining how these Lancaster price sheets prove such knowledge or control. There was no evidence that Borg-Warner or any other company had anything at all to do with the preparation or use of these price sheets by Lancaster. No agreement, no control, no direction, no knowledge by Borg-Warner or any other appellee with respect to these price sheets was proved, either directly or by circumstances (e.g., Tr. 3010-3011).

If appellants rely on these price sheets to establish the so-called "list price" conspiracy by manufacturers, their reliance is misplaced. There is no evidence that Borg-Warner or Norge Sales ever compelled or directed the independent distributors of Norge products to follow suggested list prices. The fact that a distributor may have on occasion, or even frequently, followed a

manufacturer's suggested list price in preparing its own price sheets, is probative of no issue in this case. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963); See *Bailey's Bakery Ltd. v. Continental Baking Company*, 235 F. Supp. 705, 722 (U.S.D.C. Hawaii 1964).

Furthermore, Gilbert Freeman, without indicating any pressure or coercion by Borg-Warner or Norge Sales, testified that Lancaster did from time to time base its suggested prices on the suggested retail prices received from Norge Sales (Tr. 2830-2831). Therefore, these Lancaster price sheets were at best cumulative. The court properly excluded these documents, and in any event, their exclusion was harmless.

(6) Exhibit Number 4028. (Sp. of Err. pp. x-xi).

Exhibit 4028 is a handwritten, unsigned memo and was offered without any foundation for its genuineness or authenticity. There was no attempt by appellants to establish the authorship of this memo. Therefore, there was no foundation for its admission.

Additionally, however, the document simply does not contain the statements attributed to it by appellants. (Br. p. 143, Sp. of Err. p. xi) Appellants claim that this exhibit "clearly shows" that the primary purpose of the meeting at the Villa Hotel was to do something about Manfree obtaining Norge appliances from Mr. Green and Graybar in Los Angeles.

The document does not mention Manfree or U.S.E. In every respect it is consistent with the testimony of witnesses Gilbert Freeman, W. J. Lancaster, Eugene Schick, and Harold Bull that the San Mateo Villa Hotel meeting concerned transshipping between distributors. Therefore, the document was clearly irrelevant, or at the most cumulative of the oral testimony of witnesses and its exclusion was without prejudice.

(7) Exhibits Numbers 643, 645, 3085, 3086, 4092, 4098. (Sp. of Err., p. xiii).

This group of documents are those which appellants say show that Norge Sales and/or Borg-Warner granted direct preferential and discriminatory arrangements to the alleged co-conspirator

Hale. These documents were all properly excluded upon grounds of irrelevancy.

Exhibit 643 is a letter dated January 24, 1957 from a Mr. Collier of Norge Sales to a Mr. Christiansen of Lancaster dealing with the establishment of advertising allowances for Jackson Furniture, Macy's and Hale.

Exhibit 645 is a letter from a Mr. Holter of Lancaster to a Mr. Pavlinek of Norge Sales dated November 5, 1957 which has attached to it a list showing the amount of advertising claims filed during the first six months of 1957 for the same three retailers. Authenticity of these documents was conceded (Tr. 2689).

Even if this litigation concerned alleged violations of Sections 2(d) and 2(e) of the Clayton Act in that advertising allowances were not made available "on proportionally equal terms" to all competing customers, these documents would prove nothing. They were offered by appellants without explanation and without the testimony of any witness whatsoever as to their meaning. By themselves they show no discriminatory practice with respect to advertising allowances. Furthermore, the complaint against the appellees in this case is based upon an alleged conspiratorial refusal to deal, and there is no basis for the admission of evidence which is claimed to show "preferential or discriminatory arrangements."⁴² These documents were, therefore, properly excluded.

Exhibits 3085 and 3086 are meaningless so far as the issues in this case are concerned. Exhibit 3085 purports to be the calling card of R. M. Sanford of Hale. This was attached to a memo of a Mr. W. C. Fisher of Norge Sales. Exhibit 3086 is a copy of a letter from Sayre of Norge Sales to Sanford of Hale dated December 8, 1958 expressing regret that Sanford could not attend a reception sponsored by Norge Sales, and suggesting that when Sanford is in Chicago he stop by to see Mr. Sayre. No logical inference of anything can be drawn from these exhibits. What-

42. Even if such an issue were interjected, Exhibits 643 and 645 are without relevance. Since Lancaster did not sell Norge appliances to Manfree until May 1957, Manfree would be in no position to complain about advertising allowances granted to other customers of Lancaster before that time. Eleven out of fourteen items on Exhibit 645 relate to ads run by Jackson's, Macy's or Hale before May 1957.

ever they might prove was already established by the testimony of Sanford himself (Tr. 529-532). Therefore, the documents were not only irrelevant, but cumulative. Their exclusion was proper, and in any event harmless.

Exhibits 4092 and 4098 were excluded on the basis of irrelevancy. These documents reflect the practice of Norge Sales of holding an annual cocktail party at the time of the January Market in Chicago. Exhibit 4098 is a letter from Gilbert Freeman of Lancaster to Walter Fisher of Norge Sales asking that invitations to the then coming January Market Cocktail Party (1958) be sent to a Mr. Handleman of Macy's and Mr. Sanford of Hale. There is no evidence of how many invitations were issued, or who attended the cocktail parties. There is no evidence that either Sanford or Handleman actually received such invitations, or if received, that they accepted the invitations. The documents prove nothing, and were therefore properly excluded.

(8) Exhibits Numbers 4079, 4080, 4082, 4083, 4084, 4085. (Sp. of Err., p. xliv).

These may be generally described as distributor reports sent from Lancaster to either Norge Sales or Motorola Corporation (depending upon the product involved). These documents report the unit sales to various retailers by the distributor. The record shows that appellants' counsel only questioned Gilbert Freeman of Lancaster concerning document No. 4079 (Tr. 2629a-2631). Exhibit 4079B shows sales of Norge units by Lancaster to the White Front Store in Oakland in December 1963; and Exhibit 4079C is a similar report showing sales to White Front Stores in Oakland, San Jose and Sunnyvale in August 1964. These reports and similar ones offered by appellants showing sales by Lancaster to other discount stores such as GEM and WASCO are probative of no issue in this litigation and were therefore properly excluded.⁴³

43. If they suggest anything, it is that national manufacturers, such as appellee Borg-Warner, had no interest or concern whether their products were sold to discount stores or not, and that there was no conspiracy to maintain "list prices."

Further, even if by some gyration of the brain some logical conclusion could be drawn from these documents as to the sales policy of Lancaster, they would prove nothing as to Borg-Warner or Norge Sales, or any other appellee in this litigation. There is nothing in these documents that indicates that either Borg-Warner or Norge Sales or any other company in any manner directed or controlled or even tried to influence Lancaster's selection of customers.

(9) Exhibit Number 4108. (Sp. of Err. p. xlix).

This exhibit consists of two cards which appellants characterize as "Lancaster desk order cards." Gilbert Freeman was the only witness questioned concerning this exhibit and testified that he had never seen these cards before and didn't know what they were (Tr. 2626-2628). No other foundation as to authenticity or genuineness or as to the business record character of Exhibit 4108 was offered. Therefore, this exhibit was properly excluded.

(10) Exhibit 1773. (Sp. of Err., p. xlv).

During the examination of Bernard Freeman it was stipulated that Exhibit 1773 was the same in content as Exhibit 1722, previously admitted in evidence. It was further stipulated that Exhibit 1773 had been received by Norge Sales in December 1963. Upon this basis, counsel for appellants voluntarily withdrew Exhibit 1773 (Tr. 5950-5953).

C. The Trial Court Correctly Excluded Portions of the Deposition of Arthur Alpine.

Certain portions of the Deposition of Arthur Alpine, the deceased founder of U.S.E., were excluded from evidence. These portions concerned Alpine's alleged conversations with many persons, most of whom were representatives of one or another of the appellees or alleged co-conspirators. The reason for exclusion in most instances was that Alpine had died before there was an opportunity for appellees to cross-examine him on the various memoranda relating to these same alleged conversations (Tr. 6224-6225, 6229-6230, 6251-6252).

The failure to cross-examine on these memoranda was not due to the fault or waiver of appellees, but to the obstruction of appellants' counsel who refused to produce any of the memoranda, claiming they were privileged communications (Tr. 6219-6221). By the time an order for production of these memoranda was obtained Alpine had died (Tr. 6224).

The trial court properly exercised its discretion in excluding the Alpine testimony concerning these alleged conversations. *Continental Can Company v. Crown Cork & Seal Inc.*, 39 F.R.D. 354 (E.D. Pa. 1965). No general rule can be laid down with respect to unfinished testimony. If *substantially complete*, it should be admitted with proper instructions to the jury. *Derewecki v. Pennsylvania Railroad Company*, 353 F.2d. 436 (3rd Cir. 1965). It is submitted that Alpine's deposition was *not* substantially complete so far as the subject conversations are concerned because there was no opportunity to interrogate him with respect to the memoranda of such conversations.⁴⁴ Such cross examination would most probably have developed serious doubts about Alpine's personal recollection of the alleged conversations. (For instance, Pl. Ex. for Id. No. 550.)

Appellants cite *Re-Trac Corp. v. J. W. Speaker Corp.*, 212 F. Supp. 164 (E. D. Pa. 1962) in support of their position where the court admitted the incomplete deposition of a deceased officer of defendant under the rule "favoring admissibility of evidence in doubtful cases." However, the *Re-Trac* case is not applicable to the Alpine Deposition because there is nothing *doubtful* about the propriety of the trial court's ruling in light of appellees' inability to examine Alpine concerning the memoranda of the very conversations about which he testified. While the court in *Re-Trac* noted that plaintiff had "not indicated with particularity the area and scope of the matter not completely investigated," in the present case the matter not examined upon was precisely spelled out.

44. The trial court did not exclude the whole Alpine deposition. Part was in fact read to the jury (Tr. 6181-6212). Upon the exclusion of those portions of the deposition relating to conversations about which memoranda had been written appellants' counsel chose to forego reading any other portions of the deposition (Tr. 6277).

Contrary to appellants' assertion that appellees delayed an unreasonable period of time in attempting to obtain these memoranda (Br. p. 155), demand was made for such material by item 12 of the Subpena Duces Tecum served on Alpine in February 1961 even prior to his deposition (R. 178-182). Appellants' motion to quash portions of this subpoena did not mention item 12 (R. 173-174). Further demand for the memoranda was made during the deposition in May 1961, which appellants refused (Tr. 6219-6221). Interrogatories going to the identification of these memoranda were served on appellants on January 2, 1962 (R. 229a-c). Responses to these interrogatories were filed by appellants after an extension of time had been granted to them which amounted to a re-assertion of the claim of privilege (R. 230-231). That same month Alpine died (Tr. 6224). Between the time of the Alpine deposition and January 2, 1962 appellees were not merely sitting on their hands. Six days of deposition of Bernard Freeman were completed, answers to appellants' extensive interrogatories were prepared and filed (e.g. R. 197, 210) and answers to appellants' Second Interrogatories Addressed to Borg-Warner were prepared and filed (R. 222).

Moreover, with respect to Borg-Warner and Norge Sales the conversations either ruled out by the court or voluntarily not read by appellants proved nothing concerning the knowledge or participation of said appellees in the alleged conspiracy. Therefore, the exclusions were proper, and in any event not prejudicial.

Appellants refer to an alleged Alpine conversation with "representatives of Borg-Warner" (Sp. of Err. VIII H(e), p. xxxvi). This conversation was purportedly with someone from the Borg-Warner Acceptance Corporation. The conversation consisted of an introduction, and a request by Alpine to have this unidentified person see what he could do about getting Lancaster to sell Norge products to Manfree. (Alpine Deposition pp. 191, Ln. 25 — 195 Ln. 16). This portion of the deposition was excluded because there was no evidence with respect to the identity of Borg-Warner Acceptance Corporation (or Borg-Warner Credit Corporation), or what connection it had with this case (Tr.

6235).⁴⁵ The exclusion was proper, and in any event without prejudice as the omitted conversation was without probative value.

Appellants also complain of exclusion of portions of the deposition dealing with purported conversations with representatives of Lancaster (Sp. of Err. VIII H(g), p. xxxvii). The following observations are pertinent to this claim of error:

1) The alleged conversation with Mitchell of Lancaster: there was a memorandum of this conversation and no opportunity to cross-examine thereon (Alpine Deposition pp. 274-275). It was properly excluded by the trial court (Tr. 6256). In any event the conversation proved nothing with respect to Borg-Warner, Norge Sales, or any other appellee. It was inadmissible hearsay, and was offered without any foundation of the authority of Mitchell to speak for Lancaster.

2) The alleged conversation with Al Schmidt, the Motorola salesman for Lancaster: there was likewise a memorandum of this conversation (Alpine Deposition p. 278) which appellees were unable to cross-examine upon. It was properly excluded (Tr. 6261). Furthermore, the content of the alleged conversation was inadmissible hearsay, and irrelevant as to all appellees.

3) The alleged conversations with Mitchell of Lancaster respecting cooperative advertising funds for U.S.E.: there was no memorandum with respect to this testimony and the court authorized this portion to be read (Tr. 6266). However, appellants chose not to read this into evidence (Tr. 6277). Appellants distort the content of this alleged conversation. The Alpine testimony was only that Lancaster would not give cooperative advertising money for U.S.E. newspaper ads. (This is not surprising if U.S.E. truly advertised at prices below list price, because Lancaster had a policy of refusing cooperative advertising money to all dealers for ads specifying prices below Lancaster's suggested list price. (Tr.

45. Actually, the correct name of the company that Alpine probably had reference to in this testimony is "B-W Acceptance Corporation," a Delaware Corporation whose stock was wholly owned by Borg-Warner. This company was not named as a defendant in these cases, nor was it ever charged with being an alleged co-conspirator.

2407). In any event, the conversation was irrelevant and appellants' oversight in not reading this portion of the deposition did not affect their case.

D. The Trial Court Properly Dismissed Norge Sales From Action No. 42674 Upon Motion for Summary Judgment.

Appellants' Specification of Errors IV charges that the trial court committed prejudicial error in dismissing appellee Norge Sales from action No. 42674 on its motion for summary judgment. The first complaint filed August 12, 1960 did not name Norge Sales as a defendant, but the second complaint filed August 4, 1964 did. After full discovery was had by appellants, Norge Sales moved for summary judgment on May 17, 1965 upon the ground that action No. 42674 was barred as to it by the applicable four year statute of limitations, to wit: 15 U.S.C., § 15(b).⁴⁶ Summary judgment in favor of Norge Sales was entered on June 14, 1965 (R. 165).

Contrary to appellants' statement that the dismissal was based on the grounds that Norge Sales had not been sued "within four years from the alleged beginning of the conspiracy", (Br., p. 15) the summary judgment was granted because the court found that there was no overt act on the part of Norge Sales within four years prior to the filing of action No. 42674 which caused or resulted in injury or damage to appellants (R. 165).

While the effect of a conspiracy in a civil antitrust action is that each defendant is charged with the acts of the co-conspirators, this does not alter the operation of the statute of limitations. Thus, when an overt act causes an injury, the Statute of Limitations commences to run, and an action not brought within the time period allowed will be barred as to the conspirator who actually com-

46. 15 U.S.C., § 15(b) provides as follows:

"Any action to enforce any cause of action under sections 15 or 15(a) of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15(a) and 16 of this title shall be revived by said sections." (Effective January 7, 1956)

mitted the wrong and all co-conspirators equally responsible for such wrong. *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F.Supp. 216 (D.C. Minn. 1957).

The court in *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F.Supp. 333, 338 (D.C. Ala. 1960) *aff'd* 295 F.2d 362 (5th Cir. 1961) stated:

"The Court is of the further opinion that recovery in this action may not be predicated upon the theory that the original refusal to deal is in the nature of continuing tort or done pursuant to a continuing conspiracy. If the laws were otherwise, there would be no field of operation for a limitations period."

Appellants contend in effect that each day from August of 1960 to August of 1964 there was a new refusal to deal by Norge Sales constituting a new overt act causing injury to appellants. The only overt acts of Norge Sales that appellants pointed to during the period August, 1960 to August, 1964 were the replies to demand letters of plaintiffs written in 1961 and 1963 (Tr. Hearing of May 29, 1965; P. Tr. 50-52).

Appellants rely upon *Flintkote Company v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957) to sustain their position. However, that case did not involve the question of the statute of limitations, but rather dealt with a question of damages, and therefore is clearly not applicable to the Norge Sales situation.

As to the statute of limitations and its application to continuing refusals to deal, the case of *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963) sets forth the applicable rule.

In *Garelick*, the plaintiffs were distributors of defendant. Defendant notified plaintiffs by letter that it would cease doing business with them on October 1, 1956, which it subsequently did. Plaintiffs commenced an action on January 17, 1962. To avoid the bar of the statute of limitations, plaintiffs filed affidavits concerning overt acts which they claimed were committed within the four year period of limitation. One of the acts relied upon was a request by plaintiffs to be reinstated as a distributor coupled with defendant's failure to do anything about it. In sustaining a summary judgment for defendants, the Court held:

"The conduct on these two occasions might be overt acts but obviously the plaintiffs-appellants were not in any way injured or damaged thereby. The incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants."

The similarity between the *Garelick* overt acts and the Manfree "demand letters" of 1961 and 1963 in the present litigation is apparent.

Once a conspirator commits the damage-inflicting overt act (here the alleged initial conspiratorial cut-off) the injured party cannot abrogate the statute of limitations by treating a continuing refusal to deal as a series of separate, independent, consecutive damage inflicting overt acts. In such a situation *damages* simply continue to accrue from the original damage-inflicting cut-off. If the injured party fails to complain within four years of the initial cut-off, his action is barred even though he may have suffered damage from such overt act as recently as the day before the complaint is filed. See *Sherman v. Goerlich's, Inc.*, 238 F.Supp. 728 (E.D.Mich., S.D., 1963), *Aff'd per curiam*, 341 F.2d 988 (6th Cir. 1965).

Appellants are correct in stating that any conspirator may be added as a party and may be held liable for damage inflicted by overt acts of the conspirators committed within four years of the time such party was joined (Br., p. 136). But appellants overlook the heart of their proposition: that the party must be joined within four years of the *injury-inflicting* overt act. Here Norge Sales was not joined within that time limit. The initial "refusal" of Norge Sales to sell Norge appliances *directly* to Manfree occurred at least as early as July 11, 1960 (Pl. Ex. No. 1772). Since appellants failed to point to any damage-inflicting overt act by any of the alleged conspirators within four years from the time Norge Sales was named as a defendant in action No. 42674, appellants' cause of action as to said company was barred by 15 U.S.C., §15(b).

E. Appellants Were Not Denied Discovery of Any of the Documents Sought by Their Motions to Produce With Respect to Either Borg-Warner or Norge Sales.

Appellants complain that they were denied discovery of certain documents enumerated in item 15 of "Plaintiffs' Motion for the Production of Documents Addressed to Factory Defendants" filed in June, 1964 (Br., pp. 172-173, Sp. of Err. VIII C). Borg-Warner filed a response to this motion alleging that none of the documents called for by appellants were in the possession, custody or control of Borg-Warner (R.537-539). This was supported by the affidavit of the vice-president and general counsel of Borg-Warner (R.511-553). On the basis of this showing the trial court properly denied the motion with respect to Borg-Warner (R. 607-608).

Similarly, appellants claim prejudicial error in the trial court's ruling with respect to items 20, 22 (c)-(e) and 27(f) of Plaintiffs Motion for the Production of Documents Addressed to Factory Defendants" filed in November, 1964 (Br., pp. 175-176, Sp. of Err. VIII G). Borg-Warner filed a response to this motion stating that it relied on its responses to the earlier motion to produce; that is, that it didn't have possession, custody, or control of any of the documents sought by appellants; and that so far as Norge Sales, such items as existed were identified in the depositions of Sayre and Bull and were in the process of being collected (R. 918-920). On this basis the trial court denied the motion as to Borg-Warner, and ordered Norge Sales to produce such documents as identified in the Sayre and Bull depositions (R. 982-983). This material was subsequently produced, as evidenced by the numerous exhibits offered by appellants from the files of Norge Sales. (e.g. Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3028, 3029, 3085, 3086, 431, 643; Pl. Ex. Nos. 1924, 4058, 4059.)

Appellants make no claim that either Borg-Warner or Norge Sales actually had any of the type of documents called for in these items of their motions to produce beyond what was produced by Norge Sales. Therefore, appellants were not prejudiced by any

ruling of the trial court with respect to discovery relating to Borg-Warner or Norge Sales.

CONCLUSION

Based upon all of the foregoing facts and law it is respectfully submitted that this court should affirm the judgements of the District Court in favor of appellees Borg-Warner Corporation and Norge Sales Corporation.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM S. CLARK

No. 20770
In the
United States Court of Appeals
for the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation; NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

On Appeal from the United States District Court for the
Northern District of California

**Brief for Appellee California Electric Supply
Company**

FILED

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No. 20770

In the

United States Court of Appeals

for the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation; NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

On Appeal from the United States District Court for the
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Brief for Appellee California Electric Supply Company

JURISDICTIONAL STATEMENT

Plaintiffs UNITED SHOPPERS EXCLUSIVE (hereinafter referred to as U.S.E.) and MANFREE, INC. (hereinafter referred to as Manfree) brought two private anti-trust actions: Case No. 39336 covered the period March, 1957 to

August, 1960; Case No. 42674 covered the period August, 1960 to August, 1964.

Plaintiffs sought treble damages and injunctive relief and invoked the jurisdiction of the United States District Court pursuant to the provisions of 15 U.S.C., Sections 15 and 16 because of alleged violations by defendants of Sections 1 and 2 of the Sherman Act.

The two cases were consolidated for trial and the basic issues of liability were set forth in the pretrial order as follows:

“a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?”

“b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?”

The pretrial order specified that the issue of liability be tried first and that the issue of damages be tried thereafter before the same jury. (R. 1608-1609)

Trial commenced on September 1, 1965. At the conclusion of plaintiffs' case on the issue of liability all the defendants moved for directed verdicts and for dismissal of the complaints. On November 24, 1965, the Court granted the motions of all defendants, including appellee California Electric Supply Company (hereinafter referred to as California Electric), and judgment was entered accordingly. (R. 1912-1977)

Appellants filed their notice of appeal on December 1, 1966. (R.2048) This Court has jurisdiction over the appeal pursuant to 28 U.S.C., Section 1291.

Upon appellants' motion and subsequent to the docketing of this appeal, this Court dismissed Broadway-Hale Stores, Inc. (hereinafter referred to as Broadway-Hale) as an appellee.

There are nine appellees: California Electric, until 1963 distributed Philco appliances and television sets; Frigidaire Sales Corporation, distributed Frigidaire appliances manufactured by General Motors; Norge Sales (dismissed on summary judgment) distributed Norge appliances through local distributors; General Electric manufactured appliances and television sets; RCA manufactured television sets only; Maytag, Whirlpool and Borg-Warner and General Motors manufactured appliances; Broadway-Hale was a retailer. Various other manufacturers and distributors and retailers were defendants but were dismissed prior to trial.

STATEMENT OF THE CASE

1. California Electric Did Not Conspire with Anyone to Boycott the Plaintiffs.

(A) THE APPELLEES.

From November 1, 1956 to January 15, 1963, when its distributorship was cancelled by Philco Corporation, California Electric was an independent distributor of major appliances (herein sometimes called Philco white goods) and television sets to the retail trade. It was at no time an agent of Philco Corporation. Other distributor defendants are Frigidaire Sales Corporation and Maytag West Coast Company. The manufacturer defendants are Radio Corporation of America, Whirlpool Corporation, General Elec-

tric, General Motors Corporation, and Borg-Warner Corporation. There was no evidence of any dealings between California Electric and any of the distributor or manufacturer appellees.

The sole retailer defendant at the time of trial was Broadway-Hale. There was no evidence in the record of any dealings between California Electric and Broadway-Hale other than in the ordinary course of sales and isolated instances of liaison between Philco Corporation and Broadway-Hale over a discrepancy in the Broadway-Hale associate distributor cooperative advertising account, hereinafter described more fully.

(B) THE CO-CONSPIRATORS.

In addition to the defendants remaining at the time of trial, there were numerous defendants who were dismissed prior to the time of trial but remained in the limbo category of "co-conspirators". These included manufacturers, distributors, retailers and newspapers. There was no evidence of any dealings between California Electric and the alleged co-conspirators, other than dealings with Philco Corporation and with retailers and newspapers in the normal course of business activities.

(C) APPELLANTS.

U.S.E. was a lessor, not a retail seller. Its concessionaire for the sale of white goods and television sets, during the period concerned in this action, was Manfree.

California Electric never discussed plaintiffs with Philco Corporation during the period 1957-1963. (T. 3867) The subject of selling to the plaintiffs never was discussed by California Electric with *any* dealer, distributor, manufac-

turer or manufacturer's representative. (T. 3865) Nobody requested California Electric to forebear selling to plaintiffs. (T. 3865) Furthermore, California Electric not only had no policy of refusing to sell to discount houses, but, to the contrary, it in fact sold to plaintiff Manfree, a self-styled discount house. (T. 3688, 3756, 3934, 3935, 5713)

2. California Electric Did Not Conspire with Anyone to Boycott Appellants for the Purpose of Maintaining Retail Prices.

(A) PRICING AND ADVERTISING PRACTICES.

Under the Philco distribution system, during the period concerned in this action, there were two systems: one was a chain from manufacturer to distributor to retailer; the other was direct from manufacturer to associate distributor. (T. 3603-3609)

In San Francisco, the Philco distributor was California Electric and the Philco associate distributors were Broadway-Hale and Young Brothers, both of which were retailers. (T. 3825, 3864) Price sheets prepared by Philco Corporation contained a distributor price, a suggested retail price, and also an associate distributor price. (T. 3603-3609)

California Electric's price sheets contained several wholesale prices which were determined by the size of the initial order of a given retailer; they contained also suggested retail prices. Price sheets prepared by California Electric did not contain prices for associate distributors, such as Broadway-Hale and Young Brothers, since the latter dealt directly with Philco. (T. 3677-3684)

The advertising program set up by Philco Corporation for the benefit of retailers included co-operative advertising funds contributed one-half by Philco and the distributor and one-half by the retailer, where Philco sold to a distributor. It included co-operative advertising funds contributed one-half by Philco and one-half by the associate distributor. (T. 3603-3609) It included also a "key dealer" advertising

program, in which the advertising copy was prepared and the media were selected by Philco, and in which advertising funds were contributed entirely by Philco. (T. 3754)

It was the policy of California Electric to accept requests for co-operative advertising funds from retailers where the retailer agreed to advertise Philco products either at suggested list price, or at a lower price "with trade" or at no price. (T. 3814, 3859, 3565)

Some retail dealers to whom California Electric sold Philco products chose not to receive co-operative advertising funds, but to receive an advertising allowance in another form. One of these retail dealers was plaintiff Manfree. (T. 3971-3972)

During the period March, 1957 to September, 1958, plaintiff Manfree ordered an average of one or two units at a time with an average interval of two weeks between orders. Under these circumstances, plaintiff Manfree chose to receive its advertising allowance in the form of a two per cent discount off the invoice price. (T. 3972) On one occasion plaintiff Manfree requested co-operative advertising funds, and they were granted. (T. 3949-3951)

(B) DEALINGS BETWEEN CALIFORNIA ELECTRIC AND BROADWAY-HALE.

Broadway-Hale received no special treatment from California Electric. Broadway-Hale at no time demanded that this appellee refrain from selling to discount houses. (T. 3748-3749)

California Electric became involved in the associate distributor co-operative advertising account of Broadway-Hale with Philco Corporation on two occasions. The first instance occurred when Philco Corporation in 1957 erroneously credited \$10,000 to the account of California Electric which should have been credited to Broadway-Hale as part of the associate distributor advertising fund. Califor-

nia Electric then credited that amount to Broadway-Hale. (T. 3736)

The second instance concerned a 1956 overexpenditure by Broadway-Hale of some \$20,000 to \$40,000, incurred prior to the time California Electric became a Philco distributor. The overexpenditure occurred because of inadequate accounting procedures in use in 1956. This resulted in the discovery of a deficit in the co-operative advertising account of Broadway-Hale of \$20,000-\$40,000 in the period 1957-1958. (T. 3704) Philco and California Electric had a meeting in 1960 concerning the Broadway-Hale overexpenditure. California Electric agreed at that time to monitor the records of the expenditure of co-operative advertising funds by Hale until the deficit was ended. (T. 3725-3726)

In neither instance was California Electric required to nor did it volunteer funds for the benefit of Broadway-Hale.

3. The Sales Relationship Between California Electric and Manfree.

The record shows, that all decisions of California Electric with respect to sales to Manfree were arrived at independently and unilaterally.

Appellants rely on the testimony of their Mr. Freeman, who could do no better than hint darkly, through double hearsay testimony, of conversations with California Electric salesman, Mr. Muntain regarding "anticipated pressure", "pressure" and, finally, "repercussions" from unnamed retail dealers if California Electric did not drop Manfree as a retail dealer of Philco products.*

*While the trial court admitted into evidence the double hearsay testimony of Mr. Freeman, it did so with grave doubts as to admissibility under the *Flintkote* case and even graver doubts as to

To facilitate discussion of Mr. Freeman's hearsay testimony, we have divided it into five acts:

- (1) Commencement of sales relations (Spring, 1957);
- (2) Immediately prior to appellants' first anniversary mailer (January and February, 1958);
- (3) Immediately after appellants' first anniversary mailer (Spring, 1958);
- (4) Cessation of sales relations (October, 1958);
- (5) Meeting after Manfree form letter requesting purchase of Philco products (June, 1960).

A review of Mr. Freeman's testimony shows the following:

(1) Commencement of sales relations (Spring, 1957).

U.S.E. opened for business in March, 1957. Manfree began the sale of television sets and major household appliances in May, 1957. California Electric commenced selling major household appliances to Manfree in May, 1957, through Mr. Muntain, its salesman for the San Francisco area. (T. 3688, 3934-3935, 5713)

Mr. Freeman testified that the first conversation took place between May and June, 1957:

its weight. In its Memorandum Opinion and Order Granting Motions for Directed Verdict, the Trial Court stated, at R. 1973-1974:

"The only aspect of the case against California which can be said to be different from that of the other distributor defendants, and which merits further consideration, arises out of the testimony of Bernard Freeman of Manfree, relating to four conversations he had with Muntain. Because of serious doubt as to the authority of Muntain to speak for California Electric and the hearsay upon hearsay, and the general and conclusionary nature of Mr. Muntain's statements, there is serious question as to the admissibility of these conversations against any defendant in this case. See *Flintkote Company v. Lysford*, 246 F.2d 368, 379-389 (9 Cir. 1957). However, the Court admitted this testimony against California Electric and it will be considered."

"I met Mr. Muntain in the Manfree department in U.S.E. and I asked him about advertising the Philco line in the newspapers. And Mr. Muntain stated that not only could we not advertise it, but we—we could not advertise it. And I asked him, 'Well, suppose we spent our own money and advertised the line?' And Mr. Muntain stated that he wouldn't allow us to run it even if we used our own money in advertising Philco." (T. 5725)

Mr. Freeman admitted:

"Mr. Muntain stated, after I had urged him further about the advertising, that he *anticipated* pressure from his other accounts." (T. 5725) (Emphasis added)

Mr. Muntain, incidentally, testified that he did not recall *any* conversation with Mr. Freeman with respect to advertising of Philco products in the Spring of 1957. (T. 3941)

Mr. Rising, the general manager of the appliance division of California Electric, testified that he did not recall *any* internal discussions at California Electric in any way related to sales to Manfree in the Spring of 1957. (T. 3688)

Mr. Williamson, the general manager of Manfree, was not called as a witness by the appellants.

(2) Just prior to the appellants first anniversary mailer (January and February, 1958).

The second conversation, according to Freeman, occurred in January or February of 1958.

"I told Mr. Muntain that we were issuing advertising for our first anniversary, which would take place in March of 1958, and I requested advertising and Mr. Muntain said that he would not allow us to advertise. I told him that we were going to put out two issues, they were both printed by the San Francisco Call Bulletin. One would be an insert in the newspaper and the second one would be mailed directly to our customer list. And I further told him that if necessary we would

eliminate his ad in the newspaper and have it in the specific mailer. He told me he would let me know. And a short time later, it could have been within a week, he came back and said that *he would allow* us to advertise. And, if I recall correctly, *he would pay for the advertisement.*" (T. 5728) (Emphasis added)

Mr. Muntain did not recall *any* conversation with Mr. Freeman as to this first anniversary mailer. Mr. Williamson did not request co-operative advertising funds on Philco products for the first anniversary edition. (T. 3943)

Mr. Muntain had no recollection of any California Electric policy of limiting pictures of Philco products to mailer ads. (T. 3948)

Mr. Rising, who was questioned at great length by appellants, was not asked any questions by their counsel with respect to this conversation.

Mr. Williamson was not called as a witness by appellants.

(3) Just after the appellants' First Anniversary Mailer (Spring, 1958).

Mr. Freeman said that shortly after the ads appeared:

"I stopped Mr. Muntain, or he stopped me, and I mentioned the fact that his ad was so successful and we were doing very well in the sales of Philco products that I felt that we should set up some program. And Mr. Muntain stated that he had received so many *repercussions from his accounts and other salesmen had received repercussions from their other accounts* that he *might* have to cut us off . . . I told him if he cut us off, we would sue him." (T. 5733) (Emphasis added)

Mr. Muntain testified that he did not recall having any conversation with Mr. Freeman on the subjects mentioned in Mr. Freeman's testimony. He did not recall *any* conversation with Mr. Freeman at any time on the subject matter of Mr. Freeman's testimony. (T. 3952-3958)

Mr. Muntain further testified that, after the first anniversary edition of March, 1958 was published, he had a conversation with Mr. Valenson, the sales manager of California Electric, with respect to the results of the ad—whether the ad sold any merchandise for Manfree and in what quantity. Nothing was said in this conversation about pressure from other accounts. (T. 3957)

Mr. Rising recalled no discussion of repercussions from the appellants' first anniversary mailer, nor did he have any knowledge of a California Electric policy on advertising by discount houses. (T. 3746-3748)

Mr. Valenson and Mr. Williamson were not called as witnesses by the appellants.

(4) Cessation of Sales Relations (Fall, 1958).

The fourth of these conversations occurred in about October, 1958, at which time Mr. Williamson of Manfree was also present:

“Yes, both Mr. Williamson and myself asked Mr. Muntain why he hadn't answered our phone calls at California Electric on the subject of why we were unable to order any more Philco merchandise, and he said—I don't recall what he said the reason for not coming back was—I remember asking him why he refused to sell, or cut us off, and he said ‘because of *pressure* from stores, *from other stores*’.” (T. 5736-5737) (Emphasis added)

Mr. Muntain testified that he did not recall *any* conversation with Mr. Freeman in Fall, 1958. (T. 3967-3971)

Mr. Muntain testified that he called upon the plaintiffs in the Fall of 1958, accompanied by Mr. Valenson, for the purpose of soliciting purchases of Philco products. When they asked to see Mr. Freeman they were told to wait in a reception room. They were not invited into Manfree's office

and did not meet Mr. Freeman. Instead, Mr. Williamson, Manfree's general manager, came to the counter in the reception room and advised Messrs. Muntain and Valenson that they were no longer interested in purchasing the Philco line from California Electric as they could buy competitive merchandise at a lower price. (T. 3689-3694, 3967-3971)

On at least two or three occasions after December, 1958, Mr. Muntain called upon Mr. Williamson who gave him no orders for merchandise. (T. 3971)

Mr. Rising testified that in the Fall of 1958 he had a discussion with Mr. Valenson concerning the volume of the Manfree purchases of Philco appliances from California Electric. Mr. Rising was not interested in Manfree as a Philco dealer unless its volume of purchases increased. He requested Mr. Valenson to call upon Manfree for the purpose of soliciting orders for Philco appliances. (T. 3692)

Neither Mr. Valenson nor Mr. Williamson were called as witnesses by appellants.

(5) Meeting after Manfree's form letter requesting carload lots of Philco products (June, 1960).

Mr. Freeman testified that he and Mr. Alpine had a conversation with Mr. Weaver, a California Electric salesman, in June, 1960:

" . . . Mr. Weaver, a representative of California Electric Supply, called on Mr. Alpine and myself. At this meeting between Mr. Weaver and Mr. Alpine, and myself being present, Mr. Alpine asked whether or not—Pardon me, I would like to correct that statement. Mr. Weaver was asked to sell us Philco in carload lots. At this particular time Mr. Weaver stated they were having difficulty at the Philco factory and could not deliver us merchandise in carload lots. We then asked him if we could buy separate pieces and Mr.

Weaver replied that he couldn't even sell us individual pieces because he couldn't supply his own dealers.

. . . Mr. Weaver, after all these questions were presented to him, finally stated that he would not sell us, even though the new line was going to be shown later on that year." (T. 5778)

There was no communication between Manfree and California Electric from the early part of 1959, when Mr. Muntain last called on Manfree, to the latter part of June, 1960, when California Electric received the general form letter sent out by Manfree to many manufacturers and distributors in the industry purportedly seeking carload lots of television sets and major household appliances.

Mr. Rising testified that upon receipt of this letter, he advised Mr. Valenson of its contents, whereupon Mr. Valenson sent Mr. Weaver, a key account salesman, to call upon Manfree. (T. 3694-3699, 3915-3917)

If California Electric did not intend to sell Philco television sets and major household appliances to Manfree, it is obvious that Weaver, the key salesman, would never have been sent. Weaver took his order book and a franchise form with him. (T. 3917) Weaver told the Manfree representatives (T. 3919) that at that time there was an existing steel strike and a shortage of Philco merchandise, with the result that immediate delivery could not be made. Weaver told them that the strike would be over soon and he "would be glad to talk to you in regard to it at that time". (T. 3920)

Thus Weaver opened the way for further business relations between California Electric and Manfree, but instead of in any way pursuing the matter further, appellants filed the lawsuit on August 12.

Mr. Muntain testified that four of these "conversations" did not occur. Plaintiffs failed to call any possible witnesses

to these "conversations"—Mr. Valenson or Mr. Williamson. Mr. Freeman's account of the fifth conversation with Mr. Weaver is incredible.*

Manfree, not California Electric, terminated business relations. Manfree, not California Electric, rejected invitations to trade shows. Manfree failed to follow up California Electric's invitation to renew sales relations.

In short, the record shows that not only did California Electric not conspire to boycott appellants, but also it did not refuse to sell Philco products to Manfree.

California Electric was terminated as a Philco distributor in January, 1963. (T. 3666)

DISCUSSION OF APPELLANTS' SPECIFICATIONS OF ERRORS

Specification I—Granting Motion for Directed Verdict and Dismissing the Complaint as to Each Defendant.

There is no discussion of this specification by appellants under this section and, therefore, no answer is made to this point at this stage of this brief.

*Small wonder that the trial court, after considering Mr. Freeman's testimony, said in its Memorandum Opinion, at (R. 1976): "These, as the Court has indicated above, are for the most part self-serving hearsay statements expressing opinions and conclusions and without any real identification of the source of the pressures or identity of the 'other accounts' or 'other stores', and as such lose much of their probative force. Such statements under proper circumstances might well be significant, and since the objections thereto voiced above go to their weight rather than to their admissibility, had there been independent proof of a conspiracy and California Electric's connection therewith, it could be reasonably argued that they were enough to send the case to the jury as to California Electric. *But there was no independent proof of the wide combination and conspiracy here charged*, and absent a showing of some connection or concert of action of California Electric with one or more of the defendants or co-conspirators, these statements, binding only on California Electric, *become mere unilateral reflections of the business practices of California Electric.*" (Emphasis added)

Specification II—Ordering a Separate Trial on Liability.

The Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States, Section VI, "Plan of Trial," Subsection A, recommends pre-trial decisions as to whether there will be separate trials of some issues, and specifically suggests the possible separation of the issue of liability from the issue of damages in Subsection (3) thereof.

Specification III—Limiting Proof to Evidence of Alleged Horizontal Conspiracy.

This specification of error, common to all appellees, is extensively argued in the briefs of other appellees and will not be repeated here. We incorporate by reference the replies in the briefs of the other appellees.

Specification IV—Summary Judgment in Favor of Norge Sales.

This is a specification solely related to Norge Sales and, therefore, is not commented upon in this brief.

Specification V—Excluding Evidence as to Alleged Violations of the Sherman Act.

This section covers 57 pages, starting at page ii and ending at page lix.

Each of the Subsections A through G is separately devoted to a particular named appellee. Subsection A is the only one that concerns appellee, California Electric and, therefore, is the only segment of this group of subsections that requires comment from us.

Subsection A is divided into certain subsections as follows:

(1) THE EXCLUSION OF FREEMAN'S TESTIMONY OF VALENSON'S STATEMENTS.

In the first of these (V-A-1) appellants complain of the exclusion of testimony of Bernard Freeman, the chief officer of appellants, regarding Mr. Valenson's alleged statements to him. The record not only shows that appellants made no effort to bring Mr. Valenson to the trial, eschewing repeated admonitions by the Court to do so, but also shows that in Valenson's deposition, taken by appellants before trial, not one word was asked about the alleged statements.

Counsel's endeavors are surprising. He stated he wished to lay a foundation (for hearsay testimony by Mr. Freeman of what Mr. Valenson was supposed to have confided to him) by asking Mr. Rising of California Electric whether or not he and Mr. Valenson had an argument about pay. Counsel suggested that this would establish the reason why Mr. Valenson later may have been willing to defect to appellants.

This labyrinthian approach was properly rejected by the court. (T. 3762):

"The court: All right, the court is prepared to make its ruling. The offer of proof is rejected. It is just that simple. No basis for it, Mr. Keith. *You can call Mr. Valenson and you can put in his deposition.*" (Emphasis added)

On the same page of the transcript, the trial judge says:

"You had ample opportunity to take his deposition on this subject in full, Mr. Keith. Your present offer is rejected as far as this type of proof goes."

There is a later reference to this situation where counsel for California Electric, at pages 3567-3569 of the transcript, pointed out that Mr. Valenson had been produced at a deposition, yet Mr. Keith failed to question him on any of

the statements ("admissions") that Mr. Freeman says Mr. Valenson made in spite of the availability of a complete range of cross-examination of one called as an adverse witness.

Still later, the court again reminds counsel that he should put Mr. Valenson on the stand. (T. 3577) :

"It may be that your only out is to bring Mr. Valenson here, Mr. Keith :

The Court didn't stop with merely this repeated advice and admonition ; it spelled out the reason. (T. 3577) :

"The Court: If this is not an act or declaration of a co-conspirator in furtherance of a conspiracy, then Mr. Freeman cannot testify as to what Mr. Valenson said. The only one that can testify is Mr. Valenson, whatever his name is."

Let us now examine the challenged specific rejections of Mr. Freeman's versions of what Mr. Valenson was alleged to have told him. Appellants divide the Valenson story into three parts, designated (a), (b), (c), each described as "admissions" by Mr. Valenson.

(a) In subsection (a) appellants argue that testimony by Mr. Freeman that Mr. Valenson (ex-employee of California Electric) had stated that appellants had "a million dollar conspiracy case" and that "he couldn't take it anymore" and was "willing to help appellants" constitute "admissions" under the law of evidence. Appellants rely upon pages 3556-3569 and 3574-3579 of the transcript which contain *no testimony whatsoever*. The reference to the record is merely colloquy between Mr. Keith, Mr. Littman, Mr. Dold and the Court.

(b) Similarly, in subsection (b) (page ii) appellants assert that Mr. Valenson told Mr. Freeman that members of California Electric has requested him to give

false testimony in his deposition and that the company was afraid to have him testify. Appellants cite pages 3757-3762 of the transcript in support, but in those pages Mr. Rising (an employee of California Electric) states that after this suit was filed he asked Mr. Valenson if he had done anything that would justify a suit, and Mr. Valenson said he had not (T. 5757). At page 3758, lines 3-8, Mr. Rising states that he never talked to Mr. Valenson about his deposition. The rest of the record references by appellants in this subsection consist again of mere colloquy between the Court, Mr. Keith, Mr. Dold and Mr. Littman with respect to an attempted offer of proof and do not contain any testimony.

The short answer to this asserted error was given by the trial judge (T. 3862) who told appellants to call Valenson as a witness or at least read his deposition. They did neither.

(c) In subsection (c) appellants state that Mr. Valenson admitted that Mr. Muntain, a California Electric salesman had not told the truth, in his deposition, about California Electric's refusal to deal. There is no testimony of Mr. Valenson. The "evidence" appellants would rely on here is that Mr. Freeman (appellants' leader) says Mr. Valenson, an ex-employee, told him that Mr. Muntain, a California Electric employee, had lied in his deposition. No clue is given as to what or how. No mention is made in appellants' brief of the fact that Mr. Muntain was on the stand at the trial but was not asked a word on this subject.

It is parenthetically noteworthy that, on March 25, 1963, at Freeman's deposition, a memorandum prepared by Mr. Freeman of his alleged conversation was introduced into

evidence as Exhibit No. 32 to that deposition. Mr. Freeman's litigation memorandum states that California Electric, after 17 years, had cut Valenson's throat and that he is willing to testify on appellants' behalf. It contained no reference to a Valenson opinion as to any million dollar lawsuit nor to any opinion that John Muntain had lied. When Mr. Freeman was asked why he didn't put these alleged statements of Mr. Valenson in his memorandum to his own counsel, his answer was that it was "probably neglect" on his part.

(a) An Agent's Authority Must Be Proved Before His Statements May Be Considered as an Admission.

Appellants' theory of the admissibility of Mr. Freeman's hearsay report of Mr. Valenson's hearsay statements is that Mr. Valenson was California Electric's agent and the statements were within the scope of his authority and were made in furtherance of the conspiracy.

Appellants made absolutely no effort to establish the fact of agency. As stated in 4 *Wigmore*, Evidence Section 1078 (3d ed. 1940):

"It may be noted that the *fact of agency* must of course be somehow evidenced *before* the alleged agent's declaration can be reached as admissions . . ." (Emphasis added)

Under conventional conceptions of agency law, an employee may make admissions which will be receivable against his employer *if* he has either express or implied authority to make such statements. (California Civil Code Section 1222(b)).

The question of authority depends upon the rules of the substantive law of agency. *Flintkote Co. v. Lysfjord*, 246

F.2d 368, 384-385 (9th Cir. 1957), cert. denied, 355 U.S. 835 (1957); *Restatement (Second) Agency* §§ 286 and 288.

In *Flintkote Co. v. Lysfjord*, *supra*, the Court in reversing a judgment in a private anti-trust action said:

“One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements (Footnote omitted.).” (at 382)

Mr. Freeman’s proffered testimony is obviously self-serving.

The Court has the

“duty of seeing that any evidence, ordinarily inadmissible as hearsay, is admitted into evidence for the jury to consider *only* when a proper foundation for its admission has been laid.” (at 385)

“There was an utter lack of proof of or any questioning seeking to establish Ragland’s authority to speak on behalf of Flintkote, concerning the alleged incriminating statements of Krause, Howard, and Newport, threatening Flintkote with a boycott.” (at 385)

It was error, said the Ninth Circuit, to admit the hearsay declarations attributed by plaintiff to Ragland (a promotional salesman) “without any foundation showing the extent and scope of the authority resting in the employee Ragland, if any, to act for and bind the corporate defendant.” (At 385) The hearsay declarations attributed to Baymiller (an assistant sales manager) could be admitted “provided that a proper foundation had been laid.” (At 386)

In *Northern Oil Co., Inc. v. Socony Mobil Oil Co., Inc.*, 347 F.2d 81, 85 (2d Cir. 1965), the Court in reversing a judgment because of the erroneous admission of hearsay declarations of an alleged agent followed the rule in Section 286 of *Restatement (Second) Agency*, and held:

“Thus, the relevant inquiry should have been whether that employee had any general authority to make state-

ments concerning corporate litigation . . . Even if as claimed the employee had temporary direction over operations and sales in Vermont, it would still have been necessary in this case to establish nature of his authority to speak concerning corporate litigation."

The theory upon which an agent's statements are admissible is that the party is vicariously responsible for the acts of the agent within the scope of the agency authority. Thus, the statement must have been made in furtherance of the alleged agency or conspiracy.

What portions of the record do appellants rely on to prove the scope of Mr. Valenson's authority or his background or training to evaluate the lawsuit as a "million dollar lawsuit"? What is Mr. Muntain supposed to have lied about?

It is clear that Mr. Freeman may not testify to the conversation until Mr. Valenson's authority has been established.

Such cannot be established:

1. Mr. Freeman's own memoranda show Mr. Valenson not only was not acting on behalf of California Electric, but was a disgruntled ex-employee seeking revenge.

2. The principals of California Electric deny the authority.

3. There is no evidence that Mr. Valenson was authorized to make any statements concerning the subject matter.

4. None of Mr. Valenson's statements were made in the course of any authorized sales activity.

5. Appellants refused to call Mr. Valenson to the stand in spite of repeated invitations by the Court to do so.

6. Appellants didn't introduce Mr. Valenson's deposition.

7. Appellants avoided this subject matter when they took Mr. Valenson's deposition.

8. There is no foundation as to Mr. Valenson's qualification to assess the worth of a law suit, particularly in the "million dollar" class.

9. There was no attempt to show Mr. Valenson's knowledge of the testimony of Mr. Muntain.

10. There was no attempt, when Mr. Muntain was examined at the trial, to show what he had allegedly lied about.

(2) EXCLUSION OF A PORTION OF MR. RISING'S TESTIMONY.

Appellants next complain [Subsection A (2)] of the exclusion of "testimony" of Mr. Rising concerning "the general practice of manufacturers" with respect to advertising retail prices in order to get advertising credits.

This is another subversion of the truth. The transcript (and appellants' specifications of errors at p. viii) shows that the question to Mr. Rising was whether California Electric did not have a policy of refusing advertising credit unless the dealer advertised at the suggested list price *or* at no price at all. The witness starts to answer by saying:

"General industry practice that the factory establishes the price, that they will allow the cooperative advertising to be—."

He was interrupted by prompt objection and the testimony was stricken.

From the foregoing it is quite obvious that:

1. This was an unresponsive answer to a specific question. The question was with regard to the *par-*

ticular distributor's policy, yet the answer starts (but never finishes) a discussion of *general industry* practices of factories.

2. California Electric is a distributor; it is not a factory. Thus, there is no showing of his qualifications, as an employee of a distributor, to testify as to general industry practices of manufacturers.

3. Appellants never pursued the subject with this witness either as to California Electric's policy or as to industry practice.

It is quite clear from the testimony quoted by appellants at pages iii to iv that the witness *never* stated what the general industry practice was, nor did he state enough even to indicate he had any knowledge of general industry practice. In fact, even as to his own company's policies, he knew only "in general". (T. 3813)

Appellants would torture this fragment of an answer into evidence that the general practice of manufacturers was to require that suggested retail prices be shown in retail advertising.

(3) EXCLUSION OF EXHIBITS.

The third and final reference to California Electric in this Specification deals with the exclusions of three groups of exhibits.

In the first group are listed Exhibits 68, 69 and 85. The appellants refer, in connection with these exhibits, to the transcript pages 3837-3841. Those pages of the transcript show only that the witness, Mr. Rising, testified that these particular exhibits were *not records kept by California Electric*; that Mr. Rising assured the Court and counsel that they were *not* this appellee's records and that this witness knew nothing about them. Counsel made no effort

then or thereafter to lay any kind of a foundation for the introduction of these exhibits. His sole "foundation" was that they were found in the files of California Electric and they had Broadway-Hale's name on them.

The refusal to accept Exhibit 1789 into evidence through the testimony of Mr. Rising is assigned as error. At transcript page 3716, line 22, the following appears (Mr. Rising on the stand):

"The Court: Have you seen that letter before?

"The Witness: No."

Counsel then continues with another try (T. 3716):

"Mr. Keith: Shown to you in your deposition, wasn't it, Mr. Rising?

"Mr. Dold: Wait a minute.

"The Witness: *I don't recall* this letter.

"Mr. Keith: Now, Mr. Burke was at that meeting, was he not?

A. According to this, *I don't know where* the meeting took place *or anything else.*" (Emphasis added)

Complete ignorance of the document is no foundation whatsoever. Appellants are frivolous in asserting error here.

The transcript also shows with respect to this exhibit at page 3716, line 2 to line 10, the following:

"Q. Well, let the records show, Mr. Rising, you were there. Did you or did you not ask for a \$10,000 payment from Philco to cover Hale—

A. My recollection is we did not.

Q. You did not.

A. We did not.

Q. And this letter does not refresh your recollection that you did; is that correct?

A. No, it does not."

The foregoing constitutes the sum total of counsels' efforts to lay a foundation for this document! It shows that the witness is completely ignorant of the document. It is incredible that appellants should urge that a foundation was laid for its introduction.

The last exhibit referred to in this specification of error is Exhibit 5021. It was rejected on the grounds of hearsay and irrelevancy on the motion of Broadway-Hale. The transcript at pages 3737 to 3738 shows that: Mr. Rising (a) did not attend the meeting referred to in Exhibit 5021; (b) did not recall that there was ever a meeting such as that referred to in Exhibit 5021; (c) and did not have any knowledge whatsoever whether California Electric paid the costs for a dinner with someone from Broadway-Hale.

The Court asked whether this witness had any recollection at all of the dinner meeting referred to in the exhibit, and the witness said he did not. Thereupon, counsel ceased his attempts to lay a foundation, if we can dignify the action by the word "attempt", and yet offered Exhibit 5021 which obviously had not been identified in any respect. Counsel made no further attempt to identify it.

Furthermore, even if California Electric had paid a bill for a dinner attended by someone from Broadway-Hale, what is the probative value of that fact absent any evidence or offer of proof as to who was there and why and what was said?

Specification V—Subsections B Through G: Exclusion of Evidence.

These specifications refer solely to other appellees and, therefore, are not commented upon here.

Specification V—Subsection H: Exclusion of Certain Portions of the Alpine Deposition.

The deposition of Arthur Alpine, the President of appellants, was taken by appellees. He was asked to produce his memoranda and notes of conversations with appellees and he refused to produce them. The completion of this deposition was expressly reserved "until matters reflected by the record, which precludes conclusion of the deposition, are clarified." (Dep. Alpine p. 687, lines 11-19) There are specific and express reservations of rights to continue the examination of Mr. Alpine when and at such time as he produced the pertinent documents (Dep. Alpine pp. 685, 687, 629).

Interrogatories to identify dates and other information regarding the Alpine memoranda were served (R. 299 a-c) and appellants secured an extension of time to answer (T. 6247). Mr. Alpine died on February 18, 1962 (T. 7022) before the interrogatories were answered and before the appellees could question him about the memoranda and notes and other subjects that might be developed thereby.

Thus, the deposition is unsigned by Mr. Alpine (no waiver of signature was made by anyone), never read or corrected by him and was not otherwise completed even as to scope of inquiry.

Appellants (Brief p. 155) admit that Mr. Alpine died "before completion of the deposition".

Appellants were offered the opportunity to read most of the fragmentary deposition into evidence. (T. 6181 to 6212), but appellants refused to do so. (T. 7277) Also, the excluded portions, as to *this* appellee, contain nothing adverse to California Electric and, for the most part, were repeated by Mr. Freeman in his deposition and at the trial.

Appellants, in Subdivision (d) of this specification of error, discuss the excluded portion of the Alpine deposition (pp. 279-280) so far as California Electric is concerned. The first is his testimony as to an alleged conversation with John Muntain of California Electric in which Mr. Muntain is reputed to have said that he was receiving pressure from his bosses who were receiving pressure from "their Mission Street accounts". Quite obviously whatever the "bosses" said is hearsay. Furthermore, just who are the "Mission Street accounts" is not indicated. They are not even identified as any of the alleged co-conspirators. Nor is there any suggestion of what the "pressure" was.

The simple answer to this innuendo is that California Electric elected to and did sell to Manfree and that it was Manfree who terminated the relationship because of a better deal with a competitor.

The second excluded portion of the Alpine deposition (Dep. 569-573) which related to California Electric was that after the form letter of June 24, 1960. Mr. Weaver of California Electric called on Alpine and asked him if he really wanted to purchase a carload of merchandise. Mr. Alpine says he replied affirmatively, and that Mr. Weaver replied that the company had a shortage of merchandise with the result that appellants, therefore, would not be able to get carload prices on it. This certainly suggests no wrong-doing whatsoever.

Apart from the question of relevancy or any other basis for objection, the Alpine testimony in these respects would have been cumulative because Mr. Freeman testified to the very conversation at which Mr. Alpine and Mr. Weaver were present. Mr. Weaver also testified to this conversation (Freeman's testimony at p. 5778; Weaver's testimony at pp. 3917-3921). The rejected Alpine testimony does not contradict their testimony.

The only other testimony related to California Electric is Mr. Alpine's conclusionary summation that Mr. Muntain turned down appellants' request for co-operative advertising funds. (Alpine Dep. p. 418) This testimony again would have been merely cumulative because it was repeated in more detail by Mr. Freeman, the then Vice President and later President of Manfree. (T. 5725)

Thus, the particular excluded portions of Alpine's deposition concerning California Electric, since they were either cumulative or inconclusive, would not have advanced appellants' cause and the exclusion did not hurt the presentation of their case. In any event, the deposition was never completed and, therefore, was inadmissible.

There are three bases for suppressing the incomplete deposition:

First, the purported deposition was not submitted to, nor signed by, the witness in accordance with the mandate of Rule 30(e);

Second, the deposition was never completed because of Alpine's unreasonable refusal to answer;

Third, the appellants made no effort to have the deposition completed or signed.

It is the duty of a plaintiff to get his case to trial. Defendant's sole duty is to meet the plaintiff step by step and he has no duty to initiate action to ready the case for trial. In *Vorheis v. Hawthorne-Michaels Co.*, 151 C.A.2d 688 at 694, 312 P.2d 51, (1954) although the defendants had the deposition in their possession for six months and failed to obtain the signature of the deponent, the Court nevertheless held that to be the burden of the plaintiff, not the defendant.

3 *Wigmore*, Evidence § 802 (3d ed. 1940) points out that the term "deposition" has an exclusive meaning: "Testimony which, in legal contemplation, does not exist apart

from a *writing made or adopted* by the witness". (Emphasis added) The author discusses the special necessity for guarding against inaccuracy due to the departure from the oral form and the reduction into writing. If the witness himself wrote the statement entirely, no special problem would arise; *however*, since it is an *intermediary* who makes the writing that is to become the testimony, therefore, says Wigmore, it becomes "*specially necessary* to make sure that this writing shall represent precisely the statement for which the witness stands responsible". Among the special rules which this distinguished author refers to is the "requirement of 'the witness' deliberate and knowing endorsement of the transcription as completed".

Wigmore, at § 805, makes it clear that the signature is a technical requirement, but nevertheless an *indispensable* one under the statutes. He points out that a deposition is the creature of the statute and because the testimony is exclusively to be found in a writing made by another, then, if it is not signed, the technical requirements are *not* fulfilled and the writing "*never becomes testimony, and there is no testimony of that witness*". (Emphasis added)

Rule 30(e) is identical with California Code of Civil Procedure 2019(e). Justice Peters of the California Supreme Court, in *Coy v. Superior Court*, 58 C.2d 210 at 218-219, 373 P.2d 457 (1962) had the following to say regarding depositions under this section:

"A deposition is not final until read, signed and filed. Until that time it may be corrected or the answers changed."

"Certainly an answer in a deposition remains undetermined, or uncertain, until such time as the document is signed."

Accord: People v. Hjelin, 224 C.A. 2d 649, 37 Cal. Rptr. 36 (1964); *Western Concrete Structures Co., Inc. v. James I.*

Barnes Constr. Co., 206 C.A. 2d 1, 23 Cal. Rptr. 506 (1962); *Bennett v. Superior Court*, 99 C.A. 2d 585, 222 P.2d 276 (1950); *Noah v. Black & White Cab Co.*, 138 C.A. 236, 32 P.2d 437 (1934); *Thomas v. Black*, 84 C. 221, 23 Pac. 1037 (1890).

The federal rule is interpreted in the same manner as the California Code section. *Smith v. Insurance Company of North America*, 30 F.R.D. 534, 536 (N.D. Tenn. 1962); *Continental Can Co. v. Crown Cork & Seal, Inc.*, 39 F.R.D. 354, 356 (E.D. Pa. 1965).

Appellants reliance on *Re-Trac Corporation v. J. W. Speaker Corporation*, 212 F. Supp. 164, 168 (E.D. Wis. 1962) is misguided. In that case the *plaintiff* took the deposition of defendant's president and at its close plaintiff's counsel indicated an intent to continue the deposition at a future date on matters relating to the subject matter only of defendant's counterclaim. The deponent died prior to resumption and it was plaintiff who objected to the admission of the testimony on the ground that it was incomplete and that he had taken the deposition for discovery, not for perpetuation of testimony. Furthermore, and equally important, the plaintiff had had *full* cross-examination and had not indicated any matter that he had not completely investigated as far as his case was concerned. The Court pointed out that the deposition was complete as to plaintiff's case.

The other authorities cited by appellants are similarly inapposite: In *Battelli v. Kagen & Gaines Co., Inc.*, 236 F.2d 167 (9th Cir. 1956), neither defendant nor his counsel attended the deposition and, therefore, since the defendants elected not to be represented at the deposition, they could not object to its admission; 4 *Moore Fed. Prac.* § 3202 deals only with effects of irregularity in depositions, not with the

subject of incomplete depositions or failure to sign. In *Inland Bonding Co. v. Mainland Nat. Bank of Pleasantville*, 3 F.R.D. 438 (D.C.N.J. 1944), plaintiff took the deposition and completed it; in our case, the defendants were taking the deposition and were denied the opportunity to complete it. In *Paul v. American Surety Company of New York*, 18 F.R.D. 68 (S.D. Tex. 1955), the defendant took and completed plaintiff's deposition but did not have plaintiff sign and allowed 17 months to elapse before presenting it for signature during which time the plaintiff died; here Alpine's deposition could not be completed because of appellant's refusal to produce the pertinent memoranda of the alleged conversations he had had with representatives of appellees.

Specification V—Subsection I: Excluded Evidence of Alleged Conspiracy to Control Market Entry in San Francisco.

There are twenty-one (21) subdivisions to this specification.

The first eight relate to other appellees and are, therefore, not applicable to California Electric.

The ninth through the sixteenth subdivisions are inapplicable to the appellee because they deal with meetings of associations where this appellee is not involved.

The seventeenth subdivision complains of the exclusion of certain studies prepared by appellants' witness which were self-serving hearsay and put forth without either foundation or relevancy. The eighteenth subdivision covers certain advertising credits allegedly allowed to Broadway-Hale by others than California Electric. The nineteenth refers to two other appellees. The twentieth complains of rejection of damage evidence which, obviously, is not material or relevant on the sole issue of liability.

The final subdivision of this specification asserts error in the rejection of a surprise offer of proof of the testimony of an unlisted witness, one Fractenberg, a former officer of Klors, and in the refusal to permit the introduction of the deposition of Mr. George Klors from another lawsuit many years before to which California Electric was not a party. Appellants reason for seeking to introduce this deposition and the testimony was to prove that there had been some sort of conspiracy with respect to Klors antedating this alleged conspiracy.

In *Dart Drug Co. v. Parke, Davis & Co.*, 221 F. Supp. 948, (D.C. 1963) the court summarily dismissed a treble damage suit born out of the government's litigation against Parke, Davis. The defendants subsequent decision to stop selling to the discounter who was the government's complaining witness, was held not to be a violation of Section 1. The new refusal to deal was not accompanied by any attempt to induce wholesalers or distributors not to sell to Dart. An argument that this second refusal of Parke, Davis to deal with Dart must be deemed to have been a product of the original combination between them and its wholesalers was rejected:

"The mere fact that a person has violated the law on one occasion is no proof that some later action of his, which on its face is not a violation of law, must be tainted with the illegality of the prior act."

Appellants neglect to state that the *Klors* case was eventually tried before a jury and was lost by Klors. The final result was a directed verdict for defendant.

The inapplicability to California Electric of any of the offered testimony from the Klors gang, particularly from a case to which California Electric was was a party, is apparent and needs no further comment.

Specification VI (A)—Alleged Ruling That Appellees Were Not Bound "By the Adverse Testimony of Their Employees".

We emphasize the two words "testimony" and "employees" in the foregoing caption to highlight the misrepresentation. Under this specification, as to California Electric, appellants incorporate by reference the earlier specification V-A-1, thus trying to make two specifications of error out of one. The portion so incorporated by reference is Mr. Freeman's story of what Mr. Valenson had told him after Mr. Valenson had been discharged by California Electric.

Here is a striking illustration of the duplicity that permeates appellants' brief. Mr. Valenson at the time of the statements he is purported to have made to Mr. Freeman was (according to Mr. Freeman) an ex-employee and a disgruntled one at that. The proffered evidence is *not testimony* of Mr. Valenson at all, but is testimony of Mr. Freeman about a hearsay statement Mr. Valenson is supposed to have made while an ex-employee. Thus, there is no "testimony; there is no employee". The appellants know that.

Specification VI (B)—Alleged Ruling That "Managing Agents", Who Were No Longer So Employed, Are Not Adverse Witnesses Under Rule 43(b) So as to Be Impeachable.

In this section appellant, so far as California Electric is concerned, refers (Subsection c) to the testimony of Mr. Muntain. Here again is a shocking example of appellants' cavalier treatment of the record. We have underscored again the key words to make clear the sham. The record shows that Mr. Keith expressly stated he was *not* calling Muntain as an adverse witness. (T. 3933) At p. 3933, lines 16 to 22, the following appears:

"The Court: All right, Mr. Keith, he is your witness. Mr. Keith, this is not 43(b).

Mr. Keith: Well, I am *not* calling him under 43(b) as an adverse and hostile witness.

The Court: You do?

Mr. Keith: I say *I am not, as a hostile and adverse witness*. I hope to qualify him."

On the same page of the transcript (3933) the witness states that he has no supervisory capacity over other personnel and that he was strictly a salesman. At page 3950 of the transcript it is shown, for instance, that Mr. Muntain had no authority to deal with co-operative advertising.

Obviously, he is not a "managing agent" as appellants would suggest in the caption, and Mr. Keith admits specifically that he was not "adverse".

Specification VI (C)—Ruling That Certain Witnesses Were Not Hostile and Adverse to Appellants.

None of the witnesses listed had any connection with California Electric nor did their testimony concern appellee.

Specification VII—Denying a Full Cross-Examination of Witnesses.

Under this subdivision, as to California Electric, the appellants list Mr. Rising and Mr. Muntain.

As to Mr. Rising: Appellants cite transcript pages 3865-3867. Those pages show that the witness testified that no dealer, distributor or manufacturer ever suggested or directed that California Electric not sell to appellants; that he never discussed that subject with any dealer, distributor, manufacturer or manufacturer's representative.

Appellants' counsel asked whether, during the period 1957-59, Mr. Rising didn't have a belief (calling for an inadmissible subjective guess) that Broadway-Hale was indicating its desire that suppliers not sell to the discount stores in San Francisco. Objection to the question was made

and overruled and the witness answered that he did *not* have *any* belief about Broadway-Hale on this subject.

Counsel then handed the Court Mr. Rising's deposition to read page 30, line 3. In that deposition, Mr. Keith asked Mr. Rising whether Broadway-Hale had indicated directly or indirectly that they would not appreciate it if California Electric sold appliances to U.S.E. or Manfree. The witness answered in the negative and volunteered his opinion that after the Klors suit if anybody at Broadway-Hale ever said or indicated anything like that, he would have been fired immediately. He said that they were gun shy. "You couldn't discuss it with them." The witness was then asked, "Mr. Sanford discussed with you, did he not, whom you were selling your line to?" Answer: "No."

As to Mr. Muntain: Appellants cite transcript pages 3939-3941. This is a repetition of Specification VI (B). Here again appellants are trying to get double mileage out of the same alleged error by repeating it as if it were new. As noted above in the reply to the earlier specification, Mr. Muntain was called as appellants' *own* witness, and Mr. Keith specifically stated that he was *not* calling him as an adverse witness. In the referenced portions of the transcript Mr. Keith had asked Mr. Muntain if he recalled any conversation with Mr. Freeman with respect to advertising policies of California Electric and the witness stated he did not. He then asked his own witness, "Don't you recall a conversation in 1957 in which you told Mr. Freeman that he would be unable to advertise?" Prompt objection was made to this, and the Court sustained the objection, and then Mr. Keith stated, "I am impeaching the witness." to which the Court replied:

"Impeaching? He is your witness, Mr. Keith. Sustained."

Specification VIII—Denial of Discovery of Certain Documents.

None of the requests for documents mentioned in this specification apply to this appellee.

Specification IX—Taxation of Costs Against Appellants.

The need of counsel for a daily record in a marathon proceeding such as this is obvious. Similarly obvious is the need for a copy of the deposition of officers of the parties. In this case, the transcript runs approximately 7,000 pages and was accumulated during a six-weeks trial which, in turn, was preceded by four years of discovery. During the discovery innumerable and lengthy depositions were taken.

The power to tax the costs of copies of selected depositions, of transcripts, and of exhibits and of other papers reasonably necessary for the orderly presentation of a case is inherent. *Independent Iron Works, Inc. v. U. S. Steel Corp.*, 322 F.2d 656, 676 and 678 (9th Cir. 1963). To the same effect and cited in that case is *Pearlman v. Feldman*, 116 F.Supp. 102 (D. Conn. 1953) and others therein cited.

The plaintiff who initiates an antitrust suit takes on a responsibility. If he wins, the law awards a general trebling of damages plus attorneys' fees. If he loses, it is only fair that he pay the reasonable costs incurred by the defendant as a necessary part of making an orderly presentation to the Court. It is as beneficial to the Court as to counsel.

ARGUMENT

Outline of Appellants' Position.

Stripped of its verbiage, appellants' 296 page opening brief (which includes a 63-page specification of errors) breaks down essentially into the following propositions:

- (a) Boycott: in spite of the absence of direct evidence of any boycott, there were, say appellants, cir-

cumstances which should have been interpreted as creating inferences of conspiracy to boycott. They argue for an inference of conscious parallelism from the fact that some of the appellees never dealt with appellants and others did for awhile. As against California Electric, they argue strenuously that an inference of some kind was raised against this appellee from the fact that ex-employee Valenson, who volunteered to help appellants, was not called by this appellee before it moved from a direct verdict.

This appears to be the thrust of their argument as to boycott.

(b) Evidence purportedly was improperly excluded as to each appellee.

(c) Asserted denial of right to impeach witnesses as to each appellee.

(d) Claimed abuse of discretion in:

(1) Taxation of Costs.

(2) Bifurcation of Trial.

Outline of California Electric Argument.

California Electric synthesizes its arguments in answer to appellants' propositions under the following headings:

- I. THERE IS NO DIRECT EVIDENCE OF A BOYCOTT BY THE "CONSPIRATORS."
- II. CALIFORNIA ELECTRIC DID NOT REFUSE TO DEAL WITH APPELLANT MANFREE.
- III. THERE IS INSUFFICIENT EVIDENCE OF UNIFORMITY TO SUPPORT ANY INFERENCE OF CONSPIRACY AMONG THE APPELLEES (CONSCIOUS PARALLELISM).
- IV. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A REASONABLE INFERENCE THAT CALIFORNIA ELECTRIC ACCEPTED ANY ALLEGED INVITATION TO PARTICIPATE IN A PLAN TO BOYCOTT MANFREE.

- V. THERE WAS NO UNIFORM POLICY BY APPELLEES AGAINST DEALING WITH DISCOUNT STORES.
- VI. THERE WAS NO IMPEACHMENT OF CALIFORNIA ELECTRIC WITNESSES.
- VII. THERE WAS NO EVIDENCE IMPROPERLY EXCLUDED AS TO CALIFORNIA ELECTRIC.
- VIII. THERE IS NO MERIT TO ANY OTHER PROPOSITION ADVANCED BY APPELLANTS.

The Proof Required to Avoid a Directed Verdict.

At the outset, the proper standard for the granting of a motion for a directed verdict should be noted. It is well stated in *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746 (N.D. Cal. 1959); *aff'd.*, 322 F. 2d 656 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963), wherein the District Court said:

“Plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a *prima facie* case. He must rely upon reasonable and logical inferences from the evidence in the record. *Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.*” (Emphasis supplied.)

So, where (as was the state of the evidence before the trial court in this case) “the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict. . . . By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.” *Shafer v. Mountain Telephone & Telegraph Co.*, 335 F.2d 932, 934 (9th Cir. 1964).

There is no easy shortcut in determining the truth of a charge of conspiracy. Serious charges of wrongdoing must be *proved* by the plaintiff. The defendants do not have a duty to *disprove* such charges.

I. There Is No Direct Evidence of a Boycott by the "Conspirators."

With the benefit of every reasonable inference, the total evidence is merely that, for one reason or another, certain distributors of television sets and major household appliances (colloquially called "white goods") did not select, or did not continue to use, Manfree as a retail outlet for the sale of their products.

The record is wholly devoid of evidence of communications between any of the appellees, or between appellees and anyone else, on the subjects that appellants assert were part of the alleged conspiracy, namely, the question of boycotting Manfree, the alleged policy of not selling to discount houses and the alleged insistence on adherence to list prices. The record contains uncontradicted specific denials of any agreement or conspiracy by representatives of defendants and the alleged co-conspirators.

Appellants' "brief" is a stream of consciousness, repetitive and replete with the use of editorial comment or misstatement in the guise of factual summary. The record only—not the imaginings and fancies of appellants' counsel—is what the Court must look to.

A. THE DIRECT EVIDENCE NEGATES ANY BOYCOTT.

The record demonstrates how patently ridiculous it is to speak of proof of "conspiracy" in this case. Appellants' theory reads as if it were lifted from an early Mack Sennett scenario of the "Keystone Cops" or was borrowed from a Gilbert and Sullivan libretto.

Start with the fact of the variation in the product lines of the several appellees: washers, refrigerators and televisions, and then add—newspaper publishers!

The independence of the judgments of the distributor appellees is manifest: two sold to plaintiff but at different times, California Electric from May 1957 to September 1958 and Maytag from January 1958 to March 1959. "Co-conspirator" Lancaster stopped selling to Manfree in 1957 before these two started to sell to Manfree. Frigidaire and General Electric never sold to Manfree.

Does this sound like agreement to boycott?

When Maytag canceled the Manfree franchise, that company similarly and at the same time canceled twenty to thirty other dealer franchises, including Lachman Bros. and Sterling Furniture, two of the alleged conspirators! (T. 3332-3333) Some conspiracy!

Three manufacturers (Borg-Warner, Whirlpool and R.C.A.) never sold directly to *any* retailer in Northern California, whether "co-conspirators" or not (T. 1926).

Redlick's, one of the asserted "co-conspirators," purchased nothing from "conspirator" Maytag in the years 1960, 1961 and 1962 (Pl. Ex. 641).

"Conspirator" Philco cut off "conspirator" Broadway-Hale from co-op advertising funds. Clearly Broadway-Hale did not influence Philco advertising policy (T. 3735).

Maytag stopped selling Manfree in March of 1959 and sold nothing to "co-conspirator" Macy in 1960 (Pl. Ex. 6494 and 6441).

Frigidaire, in 1959, canceled "co-conspirator" Broadway-Hale for lack of performance and never dealt with them thereafter, and the same year they did the same to "co-conspirator" Macy! The next year they canceled Lackman

Bros. refranchising that company in 1960. Sterling closed its San Francisco outlet in 1961, leaving Redlick's as the only Frigidaire distributor in San Francisco during the period 1957 to 1963. The fact that Frigidaire was not taking on Manfree creates, therefore, no inference of conspiracy.

There was never a joint meeting of representatives of Broadway-Hale, Philco and California Electric. There was never a meeting between California Electric and representatives of Broadway-Hale in which the question of the distribution of Philco products was discussed (T. 3698-3699).

Not even Mack Sennett or Gilbert would have concocted, for serious public acceptance, an idea of such an odd group of conspirators: newspapers, manufacturers of television sets, manufacturers of kitchen equipment, manufacturers of laundry equipment, distributors of various household items, a few retailers to whom many of the "co-conspirators" would not even sell and some that were terminated for cause, "conspirators" who sold to appellants and some who didn't, "conspirators" who sell to retailers and those who don't. It all adds up to a most unique and wholly imaginary "conspiracy."

For this reason appellants' massive legal quaquaversal on the issue of conspiracy is really reduced to reliance upon the suggested inferences which we have culled from the tome and will discuss after a brief comment on the alleged conspiracy with the newspapers.

B. THERE WAS NO CONSPIRACY WITH THE NEWSPAPERS.

The charge that one or more retailers control the newspapers is ludicrous.

Until 1961, when it ceased being a "closed door" store, U.S.E. was able to place only one advertisement in the

San Francisco Chronicle or the San Francisco Examiner (T. 2089-2090).

The reason was that the Chronicle had a policy against accepting advertising from stores which charged a membership fee (T. 2104-2105). The Examiner also had a policy against accepting advertising from "membership" stores (T. 2094).

This direct evidence is uncontradicted and comes from appellants' own witness, Joseph Mittelman. It is established that both the Examiner and Chronicle accepted appellants' advertising as soon as they opened their doors to the public (T. 2156-2159). Moreover, the Call-Bulletin, and its successor, The News Call-Bulletin, accepted U.S.E. advertising from the day it opened its doors. (T. 2668)

This assertion of dominance of the newspapers by one or more retailers is some of appellants' counsel's dream stuff.

II. California Electric Did Not Refuse to Deal with Appellant Manfree.

Common to all of appellants' arguments is the premise that each appellee refused to deal with Manfree. Reference is made throughout appellants' brief to the "admitted refusals to deal" and the "joint and common refusals to deal". The fact is, however, that not only does the record fail to disclose an agreement not to deal and fail to show concert of action from which such an agreement might reasonably and logically be inferred, but the record does not contain a showing that all appellees *refused to deal* with Manfree. As to appellee California Electric, the record clearly demonstrates its actual sales to Manfree and its willingness and positive efforts to continue to sell to Manfree.

California Electric sold Manfree from the time it opened its doors as the successor of its defunct predecessor in U.S.E. While a substantial initial order had been obtained from Manfree, its subsequent orders were minimal (one or two pieces on an average of every two weeks) except for one half-carload order in response to a special offer of California Electric providing unusual inducements for such an order. When Manfree's merchandise orders became so small that California Electric questioned whether further relations were worth the effort, the regular salesman and the salesmanager of California Electric visited Manfree to solicit additional sales. They were not allowed on the Manfree premises. Instead, after waiting outside, they were informed by Mr. Williamson, the manager, that Manfree was not interested in the Philco line carried by California Electric because they had found a better supplier with a better product and at lower prices. (T. 3693, 3970). Manfree's last sales order was delivered in September 1958. Despite this rebuff by Manfree's officials, California Electric's salesman, on several occasions after the September sale, made further efforts, without success, to sell this appellee's products to Manfree.

Almost two years later, in late June 1960, with this background, California Electric was added to Manfree's mailing list and received a letter with a request for carload prices and a franchise for the Philco product line. *Despite* Manfree's performance history, California Electric actively responded to the letter by sending its Mr. Weaver to call on Manfree officers at the USE premises. He told them that carload orders could not be filled at that time by Philco, California Electric's supplier, because of a steel strike which prevented California Electric from getting enough merchandise to cover existing dealers. He sug-

gested that Philco's delivery problems should be straightened out soon and extended an offer to discuss sales at California Electric's upcoming sales show, invited them to attend, and told them he would see them at the show. (T. 3694-3699, 3915-3921) Manfree chose not to attend or otherwise to accept the offer to discuss purchases from California Electric. (T. 3694) Instead, within weeks of Mr. Weaver's solicitation, appellants filed their extensive complaint against twenty-six defendants. Appellants would have us believe that the demand letter (Ex. 1783) was a genuine attempt to obtain merchandise rather than an attempt to manufacture evidence for an already contrived and prepared lawsuit.

The first portion of the opinion in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), establishes that no refusal to deal can be inferred from the mere receipt of such a demand letter. This Court there made it clear that the plaintiff who circulates such a letter and asserts a refusal to deal has the obligation of proving further, by substantial evidence, that the demand letter was in fact a bona fide offer to buy, *and* that there has been a rejection of the offer or a failure to accept the offer unaccompanied by any circumstances justifying the failure to accept. (251 F.2d at 203) The point of inquiry here is *not*, as appellants urge in their brief, whether California Electric, and the other appellees, had a valid defense for their "refusals to deal"; instead is whether there was in fact a *refusal* to initiate or once again undertake sales to Manfree. The *Moore* opinion examines in detail the evidence of the events following the receipt of a bona fide offer to purchase because if either General or Union did all that was reasonably required of them in response to the letter, there then was *no* refusal to deal. Merely to prove that following

the receipt of a "shotgun" demand letter for carload prices of merchandise no purchases were consummated does not carry the day for appellant Manfree. This is the line of false reasoning which the philosophers describe as "*post hoc, ergo propter hoc*"—after the fact, therefore on account of the fact. It is clear from the evidence, and no contrary finding could reasonably be made, that California Electric's response to Manfree's demand letter was all that could reasonably have been required of it and that by no stretch of a jury's imagination did California Electric refuse to deal with Manfree. In addition, whereas the plaintiff's letter in the *Moore* case contained an express offer to purchase, Manfree's letter to California Electric carefully avoids making an offer to purchase. If the letter *had* contained an offer to purchase, it seems clear from the size of Manfree's prior purchases that no offer to purchase in carload lots would have been bona fide, but only an attempt to create *Moore* case type of evidence for use in litigation.

It is important, this appellee suggests, for the courts firmly to strike down the proposition that, as a result of a broadside letter stating "interest" in buying merchandise in carload lots, the law requires that either sales of the merchandise involved be promptly consummated or each recipient of the letter will be faced with a charge that he has "refused to deal" with the sender. The policy of encouraging private enforcement of the antitrust laws does not include encouraging businessmen to supplement their income by engaging in the business of developing antitrust litigation. The policy of the law should be to refuse to give weight to contrived "demand letters" mailed to prospective defendants on the eve of the the filing of an antitrust complaint long in the process of preparation.

Appellants treat this response of California Electric's to Manfree's demand letter (Br. p. 103) as a "categorical"

refusal to sell to Manfree. Appellants there refer us to Mr. Freeman's conclusion that, after Mr. Weaver's visit in response to the demand letter, Manfree was never thereafter "able" to purchase from this appellee. It is noteworthy that Mr. Freeman neglects to mention and fails to deny that he had been invited by Mr. Weaver to discuss purchases, but had declined to participate further in any such discussions.

Appellants also urge (Br. p. 103) that, because California Electric failed to call its former employee, Mr. Valenson, to the stand before making its motion for directed verdict, some inference arises that the testimony would be adverse to California Electric on the question of whether there was a refusal to deal. This is most strange. The obvious and complete answer is that a motion for a directed verdict regularly is made before the defendant puts on his case.

The principle suggested by this argument actually militates against appellants. First, consider the inferences that are raised against the appellants for their refusal to call Mr. Williamson, general manager of Manfree, who, appellants assert, was present at many of the conversations testified to by Freeman, who could have verified the Freeman testimony, and who, according to California Electric witnesses, flatly told California Electric representatives that he was no longer interested in buying Philco because appellants had a better deal with a competitive line; secondly, the inference urged by appellants also arises against appellants from their failure and refusal to call Mr. Valenson or to read his deposition during their attempt to present a *prima facie* case of conspiracy, despite the repeated suggestions of the Court to do one or the other. As shown above in our comments on the specifications of error, Mr. Freeman described Mr. Valenson as a hostile disgrun-

tled ex-employee of California Electric, who sought to defect to appellants and who had volunteered to help appellants, even to return to work as a spy against California Electric. Appellants rejected invitations to produce this man.

The case appellants rely on here is *Interstate Circuit Inc. v. United States*, 306 U.S. 208, 83 L. Ed. 610 (1939), a theater distributor case where the Supreme Court upheld an inference of agreement because, among other things, the defendant distributors had

“... failed to tender the *testimony*, at *their command*, of ... any officer or agent ... who knew ... whether in fact an agreement had been reached among them for concerted action.” (Emphasis added.)

Based on Freeman's statements, the Valenson testimony was available at *appellants'* command! Definitely it was *not* at the command of his ex-employer, California Electric. This appellee did produce all of its knowledgeable personnel as witnesses (Rising, Muntain, Weaver, McDonnell).

III. There Is Insufficient Evidence of Uniformity to Support Any Inference of Conspiracy Among the Appellees (Conscious Parallelism).

It has been said that the cryptic words “conscious parallelism,” which have found their way into antitrust terminology, have no esoteric exegesis. When properly used, they constitute merely a picturesque reference to a particular kind of evidence and, as such, do not present a unique problem. The term is never meaningful by itself but only assumes whatever significance it might have from additional facts. (75 Harv. L. Rev. 655 at 658 (1962) Turner) The evidence must still be analyzed to determine whether it fairly gives rise to a reasonable and logical inference of conspiracy. If it does not, the law does not let the plaintiff's case go to the jury.

A decade and a half ago, the Supreme Court made it clear that consciously parallel conduct alone is not equated with conspiracy. In *Theatre Enterprise, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 540 (1953), the Court held that "conscious parallelism" has not yet read conspiracy out of the Sherman Act. The Attorney General's National Committee to Study the Antitrust Laws declared itself "in full accord" with the reasoning in that case.

Since that often cited decision, it has been made abundantly clear that mere consciously parallel conduct is not tantamount to conspiracy, and that the antitrust laws do not prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or similar policies. Illustrative of many cases is *Independent Iron Works v. U.S. Steel Corp.*, 177 F. Supp. 743 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656, 661 (9th Cir. 1963), *cert. denied* 375 U.S. 922 (1963), upholding a directed verdict for defendant, and holding that any sameness of conduct must *logically* suggest joint agreement, as distinguished from individual action:

"... there must be a sameness of conduct under circumstances which *logically* suggest joint agreement, as distinguished from individual action . . . The anti-trust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy." (District Court p. 746-747.)

The Ninth Circuit, in giving its blessing to the directed verdict, said (p. 661):

"The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * *"

Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962), affirmed a motion for directed verdict in favor of the defendant. In that treble-damage action, as here, the plaintiff offered no direct evidence of conspiracy. It alleged a conspiracy among the major tobacco companies and a Philadelphia ship chandler to refuse to do business with a new company setting up a chandlery operation. The "conscious parallelism," apparent in all three tobacco companies' refusal to deal with the new company, was described as weak by the Third Circuit, because the situation was not a sort which allowed much scope of action to the participants. In that case, as here, there are only two possible answers to the spanking new entity's request for supplies: "yes" and "no." The answers, therefore, can be pretty uniform without conspiratorial significance. (Manfree, of course, was a new and untried entity and a successor to a concessionaire which had failed (T. 5708-5712)).

The Court added (pp. 207-208):

"In so deciding, we are not unmindful that the defendants' refusal to deal is as effective in foreclosing the plaintiff from the sea stores tobacco business as an agreement to do so would be. It has been argued that such uniform decisions, made under economic circumstances tending to make the act of one firm or company dependent upon the reaction of others, violate Section 1 even though conspiracy is absent. With this we cannot agree. Section 1 specifies means as well as ends. Perhaps as a matter of public policy restraint of trade *per se* should be controlled but conspiracy is required in this case."

Plaintiffs' reliance on *Esco Corp. v. U.S.*, 340 F.2d 1000 (9th Cir. 1965), is misplaced. The evidence of agreement was obvious there. A competitor (who pleaded *nolo* to a

criminal charge) had called a meeting to announce its pricing plans, and thereafter all those who had attended that meeting followed exactly the pricing plans as discussed. The Ninth Circuit pointed out that there was no other purpose for the meeting but to fix the prices by concert of action. No meeting of the defendants occurred in our case.

Girardi v. Gates Rubber Company Sales Division Inc., 325 F.2d 196 (9th Cir. 1963) relied upon by appellants is far from the point. In that case there was evidence of complaints by the distributor to the manufacturer concerning the plaintiff distributor. This is one of the "plus" factors that distinguish it from the case at bar.

Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957) is cited as factually the same as the case at bar. Appellants strain mightily. Their quotation from that case (Brief p. 95) contains the essence of the basic proposition of appellants:

"Consciously parallel business behavior . . . is, however, admissible circumstantial evidence of an underlying agreement, combination or conspiracy."

Appellants argue that, assuming uniform refusals to deal with a retailer on the part of potential suppliers, and given additional evidence, such as was present in the *Moore* case, of *knowingly* uniform and concerted action, a jury could infer that the uniform refusals to deal were part of a larger scheme to effect a boycott. But the applicability of such an argument requires a showing not only of the uniformity of action, but also that the action was taken knowing it to be uniform to the business behavior of others.

In the present case, neither cooperation nor uniformity of action among Manfree's potential suppliers is in evidence.

In the *Moore* case there was ample evidence of “programs” among the suppliers to eliminate streetside price signs, evidence that a telephone call by one supplier would produce immediate similar action by another supplier, and evidence of threats that one supplier would create a united front among all distributors against an uncooperative dealer. But in this case there is no evidence that California Electric cooperated in even a single instance with another supplier, nor is there evidence from which it could be inferred that it communicated with other suppliers or had knowledge of the business behavior of any appellee. The additional evidence looked to in *Moore* was significant only in that it tended to show that the established refusals to deal (the particular practices which were claimed to have damaged the plaintiff) were the result of an agreement or understanding among the defendants.

Appellants claim that the record before this Court contains similar “additional evidence” demonstrating that California Electric’s conduct of its business was knowingly parallel to that of the other alleged conspirators. First, it is claimed that California Electric promulgated suggested price lists and refused to allow advertising fund credits to retailers unless their advertising was done at list prices. In fact, however, California Electric did not supply price lists at all to the alleged instigator of this imaginary conspiracy, Broadway-Hale (T. 3684), and, in fact, sold to appellant Manfree who elected to receive a discount off invoices to it in lieu of an advertising allowance. (T. 3971-3972)

Secondly, appellants assert that other “price-cutters” were cut off by the defendant distributors, and refer us to page 71 of their brief to substantiate the charge. But, in fact, there is no showing there, or elsewhere in the record, that California Electric cut off any retailers.

Thirdly, appellants assert that there was evidence of communications between California Electric and other appellees concerning marketing and pricing practices. As the only support for this charge, appellants advise the court that other distributors were invited to California Electric's trade shows (as were officers of appellant Manfree itself); that an officer of Lancaster deemed his company to be a "friendly competitor" of California Electric, inferring, we suppose, that "co-conspirator" was an "unfriendly competitor" of the other appellees. There is no suggestion that being a "friendly competitor" involved the exchange of information of any sort whatsoever. Appellants also assert that California Electric allowed special price lists, or special product models, or special advertising funds to Broadway-Hale, but appellants can refer to nothing in the record involving either price lists or special product models from California Electric to Broadway-Hale, and they rest only on the 1957 transfer to Broadway-Hale of advertising funds erroneously credited by Philco to California Electric (T. 3736).

Thus, there is no "additional evidence" similar to that of the *Moore* case tending to establish California Electric as a party to any agreement to refuse to deal with Manfree.

A. THERE IS NOTHING TO JUSTIFY ANY INFERENCE OF A CONSPIRACY TO BOYCOTT APPELLANTS FOR THE PURPOSE OF MAINTAINING RETAIL PRICES THROUGH ANY REQUIREMENT OF USING SUGGESTED PRICES IN COOPERATIVE ADVERTISING.

The trial court in its opinion pointed out that the evidence disclosed that during some of the periods of time involved in the alleged conspiracy some manufacturers, not all, did furnish to their distributors suggested prices, but that it was clear that these were given as mere guide lines and were not mandatory. The Court also pointed out that the evidence disclosed that the retailers did not uniformly advertise price

or sell their goods at a distributor's suggested retail price. Exhibits 13043 et seq. show the numerous instances, for example, where Broadway-Hale advertised products at prices substantially lower than the retail prices suggested by the distributor. Broadway-Hale both priced and sold television sets and white goods at prices below suggested retail (T. 647-649). The practices followed by appellees varied substantially from time to time and from appellee to appellee. (Cf. T. 5066 with T. 3985-3986); it varied from retailer to retailer (T. 4086) and from one line of merchandise to another (T. 1892-1893, 1980).

The record abundantly demonstrates that retailers in San Francisco frequently have sold at prices other than the suggested retail prices (e.g., T. 5646, 5648-5649).

The manager of Manfree testified that Broadway-Hale was one of the biggest discounters in San Francisco (T. 5646).

Appellants single out Broadway-Hale as the leader of the alleged conspiracy. In some cases, receipt of co-op advertising money was conditioned upon use of either suggested retail prices or no-price in advertising (T. 603, 794-796). Other distributors, such as Frigidaire (T. 751) and General Electric (T. 1431-1433) imposed no such requirement. Broadway-Hale frequently advertised at prices below suggested retail (see Ex. 13045) and both priced and sold television sets and white goods at prices below suggested retail (T. 647-649). Maytag gave advertising allowances for below-list advertising (T. 3383-3384) and so did Frigidaire (T. 1314; 1967; 4087).

Thus, these "conspirators" all had quite different and individual policies, as many policies as there were dealers.

California Electric at one time conditioned its payment of co-op advertising on the use of suggested list prices or

no prices (T. 3859 and 3565) which was a unilateral decision it had a right to make. This would not prevent dealing with Manfree whose manager testified it frequently advertised without showing a price (T. 5647).

Mr. Muntain testified that he recalls but one situation where Manfree asked California Electric for cooperative advertising funds (T. 3953 and 3957) and the request was granted (T. 3949-3951). The record is without evidence that Manfree did in fact ever use price advertising or ever advertised discount prices for named television sets or appliances.

There is not a speck of evidence that California Electric required any retailer to sell at any specified price. Appellants rely on innuendoes based on a request, limited to cooperative advertising, that either the suggested list price be shown or no price be shown. This gives no basis for any inference that the retailer couldn't *sell* at any price he desired. There is no obligation imposed on any retailer to advertise; thus any advertising program could not be part of any boycott.

There is no suggestion at all that California Electric discussed its prices with any other distributor or manufacturer nor with any retailer in respect to the sale prices of any other retailer.

The essence of the complaint here is boycott but appellants failed to prove any of the ingredients of boycott. It is appellants' fiction that there was some sort of price fixing that prompted the boycott. Under the Sherman Act (which is the only act involved in this lawsuit) "price fixing" means a conspiracy to raise, depress, hold or otherwise fix the price of a commodity in interstate commerce. The test is whether such agreements interfere with the freedom of the retailer and thereby restrain his ability to sell in accordance with his judgment. There is an abysmal failure of appel-

lants to present any facts that meet this test.

Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3rd Cir. 1963) was a price fixing case in which the defendant manufacturer required retailers to maintain retail prices suggested in catalogues and pre-ticketed on the luggage. The Third Circuit held there was no infraction of the law in advising retailers of the manufacturer's policy (and its expectation) that customers would not resell below pre-ticketed prices. In our case there was no policy as strong and definite as that of the American Luggage Co. Appellants are really saying that even if a particular appellee believed discount advertising detrimental to the good name of his product, he nevertheless had a duty to finance the advertising of the product at a cut price or in some manner which the appellee, in its unilateral judgment, believes to be poor business practice. That proposition is patently ridiculous. Cf. *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Taubman v. Cottage Woodcraft Shops*, 194 F.Supp. 83 (S.D. Cal. 1961); *U.S. v. Colgate*, 250 U.S. 300 (1919).

Appellants cite *Plymouth Dealers' Association of Northern California v. U. S.*, 279 F.2d 128 (9th Cir. 1960), but in that case competitor members of trade associations *jointly* formulated and issued "suggested list prices" which, while not uniformly adhered to by all, were at least agreed upon "starting points" designed to stabilize ultimate prices charged. The Ninth Circuit, in that case, found that competitors met, agreed upon content, printed and circularized the "list prices":

"It was an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price . . . (it was) a plan entered into by competitors to control prices . . ." (279 F.2d 132 at 133)

There is a total absence of any proof of agreement or combination among appellees with regard to any requirement of a minimum or no-price cooperative advertising policy. There has been absolutely no interference with the freedom of choice of the retailers in connection with any advertising policy. Any of the appellees, adopting a cooperative advertising program, did so as a matter of their own free choice. There is no suggestion of any agreement between manufacturers, or between manufacturers and distributors or retailers with respect to competitors' programs.

There is *no* suggestion in the record that California Electric talked to, consulted with or was influenced by *anyone* in its policies or acts.

IV. There Is Insufficient Evidence to Support a Reasonable Inference That California Electric Accepted Any Alleged Invitation to Participate in a Plan to Boycott Manfree.

Interstate Circuit, Inc. v. U.S., 306 U.S. 208 (1939) cited many times by appellants, is advanced to support an inference of agreement or, as phrased by appellants (Brief p. 95), an acceptance "of an invitation to participate in a plan." A glance at the *Interstate Circuit, Inc.* decision shows how far it is from the mark at which appellants shoot. In that case the common course of action followed was an absolute requirement of price conformity which left no question as to intent to fix prices. No exhibitor could escape the defendants' requirements and still obtain their films. Moreover, there was identity of response in every essential detail of the various conditions ultimately imposed by the defendants. And, most importantly, each of the distributors "knew that cooperation was essential to the successful operation of the plan." In our case there was no plan; there was no cooperation.

On the facts in *Interstate Circuit, Inc.* the adoption of the plan by each distributor could be explained in terms of his own self-interest *only* if he had reason to believe that all of his competitors would join in. Thus, the Court explained:

“It takes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity *such far-reaching changes in their business methods* without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. . . . While the District Court’s finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. *Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.* They knew that the plan, if carried out, would result in a restraint of commerce, which . . . was unreasonable within the meaning of the Sherman Act. . . .” (306 U.S. 223, 226-227.) (Emphasis added)

Emphasis is added above to show how inapposite is that case to the one at bar. No appellee here made any changes in its business methods; no one was advised of what the others were doing; no one cared what the others were doing. Knowledge of the other persons’ relations with Manfree was certainly not essential to the successful operation of anyone. We have elsewhere above expressly set out how different were the acts and policies of the appellees.

If it be inferred somehow that each knew what the others

were doing and in some instances "nearly contemporaneously did the same thing," this does not, without more, make out an unlawful conspiracy, *Interborough News Co. v. Curtis Publishing Co.*, 127 F.Supp. 286, 301 (S.D.N.Y. 1954) *aff'd.*, 225 F.2d 289 (2d Cir. 1955). See also *Independent Iron Works, Inc. v. U.S. Steel Corp.*, *supra*.

The law is clear that there is no such thing as an unwitting conspirator. *U.S. v. Standard Oil*, 316 F.2d 884 (1963).

V. There Was No Uniform Policy by Appellees Against Dealing with Discount Stores.

Herbert Spencer's definition of a tragedy was to destroy a syllogism with a fact.

Appellants argue for inferences from alleged common anti-discount store attitudes. The facts are that California Electric not only had no such policy, but it did in fact sell to *this* discount store, *even* when it was a "closed door" shop.

Not only is there no evidence of a plot against discount stores, there is positive evidence to the contrary. For example, some of the "conspirators" dealt with GET, a discount store in San Francisco: Westinghouse (T. 6169); Lancaster (T. 2895); Hotpoint (T. 6073-6074 and 3185-3186). Another discount store in the Bay Area, White Front, carried the General Electric, R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets (T. 4376-4382).

As a coup de grace to this argument we refer the Court to Mr. Freeman's testimony that Broadway-Hale was one of the biggest "discounters" in San Francisco (T. 5646).

VI. There Was No Impeachment of California Electric Witnesses.

Appellants argue that where an adverse witness is impeached on any point in his testimony, the trier of fact is

entitled to disbelieve his entire testimony. Therefore, say appellants, it was error not to send the case to the jury where a witness, who testified that there was no agreement in restraint of trade, was impeached on *any* point.

Wigmore, Evidence, 3d Edition, Section 1040, page 725, in discussing what amounts to a self-contradiction for purposes of impeachment, says:

“In the present mode of impeachment, there must of course be a real *inconsistency* between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true (*ante*, § 1017).”

As to California Electric, on this point, appellants say (Brief, pp. 121, 122) they impeached Mr. McDonnell and Mr. Muntain. (It's a little difficult to translate just what appellants do say of Muntain—they say he was impeached and then say the Court refused to permit his impeachment (Brief, p. 122).)

A. MR. McDONNELL'S TESTIMONY.

Mr. McDonnell, an officer of California Electric, was called as an adverse witness by appellants.

“Q. Now, those suggested list prices (on Philco-Bendix price sheets, plaintiff's Ex. No. 1931) are based on factory price sheets, are they not?

A. *I couldn't tell you that.*” (T. 3632)

Counsel then sought to impeach the witness by reading this excerpt from his deposition:

“Q. Do you in turn (after reviewing factory price sheets) make price sheets of your own?

A. Not that I recall.

Q. You use the factory price sheets?

A. *I think we do, yes.*” (T. 3634)

The two statements are not contradictory. Quite obviously this is not impeachment (Wigmore, *supra*). The witness was uncertain on each occasion.

An attempt to lump this with *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196, 203 (1963) is made by appellants. In *Girardi*, the witness testified to lack of recollection of a conversation with certain persons on a given date. A memorandum written by the witness on the day following the conversation was admitted into evidence and impeached the testimony of the witness on a crucial fact in the case.

The Court said in *Girardi*, as to *that* witness on *that* testimony, the jury could well have disbelieved the testimony and believed the memorandum. The import of the court's decision is *not* that impeachment on any point meant that the case must go to the jury. The import is: that *this* point was so crucial to the ultimate issue of fact, the clear and real conflict on this point should have been resolved by the jury.

B. MR. MUNTAIN'S TESTIMONY.

The "impeachment" was of Mr. Muntain's testimony regarding inviting appellants to a California Electric trade show in January 1960. At the trial, Mr. Muntain testified, "I don't remember, sir, I may have." (Tr. 3632). At his earlier deposition, Mr. Muntain testified, "I don't believe we did." (Tr. 3966)

Analyzing the two answers, it is apparent that the prior statement is not an inconsistent statement and is not an impeaching statement.

We heretofore in this brief (p. 33-34) showed that Muntain was *not* called as an adverse witness and that he was not an officer, director or managing agent of California Electric.

VII. There Was No Evidence Improperly Excluded as to California Electric.

As to California Electric, appellants assert as error on this point: (1) the rejection of Bernard Freeman's testimony of what Mr. Valenson, an ex-employee, said in a hearsay statement, (2) the rejection of Mr. Rising's testimony which appellants falsely state described general industry practice.

We have already covered both of these matters in our comments on the Specification of Errors number V.

VIII. There Is No Merit to Any Other Proposition Advanced by Appellants.

The other points raised by appellants are:

(a) The alleged "impeachment" of certain witnesses which we answered in the discussion of Specification V and VII;

(b) The alleged abuse of discretion in taxation of costs, answered in our comments to Specification IX; and

(c) Alleged abuse of discretion in ordering a separate trial on the issue of liability before the issue of damages was to be tried. This we answered in comments to Specification II above.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the judgment in favor of California Electric.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VINCENT CULLINAN,

Attorney for Appellee

California Electric Supply Company

No. 20,770

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California
corporation; RADIO CORPORATION OF AMERICA, a Dela-
ware corporation; WHIRLPOOL CORPORATION, a Dela-
ware corporation; MAYTAG COMPANY, a Delaware
corporation; MAYTAG WEST COAST COMPANY, a Cali-
fornia corporation; GENERAL MOTORS CORPORATION, a
Delaware corporation; FRIGIDAIRE SALES CORPORA-
TION, a Delaware corporation; NORGE SALES CORPO-
RATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,
Defendant.

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF OF APPELLEE

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No. 20,770

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California
corporation; RADIO CORPORATION OF AMERICA, a Dela-
ware corporation; WHIRLPOOL CORPORATION, a Dela-
ware corporation; MAYTAG COMPANY, a Delaware
corporation; MAYTAG WEST COAST COMPANY, a Cali-
fornia corporation; GENERAL MOTORS CORPORATION, a
Delaware corporation; FRIGIDAIRE SALES CORPORA-
TION, a Delaware corporation; NORGE SALES CORPO-
RATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,
Defendant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF APPELLEE GENERAL ELECTRIC COMPANY

OPINION BELOW

The memorandum opinion and order by the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, granting the motion of each appellee for a directed

verdict and directing the entry of judgment thereon, appears in the Clerk's Transcript of Record at R. 1912-1976.¹

STATEMENT OF JURISDICTION

The complaints in these two actions, R. 1, 15, which were consolidated for trial, R. 1608, invoked the jurisdiction of the United States District Court under Sections 15 and 26 of the Sherman Act, 15 U.S.C. §§ 15, 26. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction from the judgment which the trial court entered pursuant to directed verdicts for all appellees.

Broadway-Hale Stores, Inc., one of the original appellees, was dismissed upon motion of the appellants subsequent to docketing of the appeal.

STATEMENT OF THE CASE

I. Questions Presented

A. Did the trial court err in holding that there was no substantial evidence from which a jury could reasonably infer the existence of a conspiracy among any of the appellees not to deal with appellants, and in directing a verdict for each of the appellees?

B. Did the trial court commit prejudicial error in excluding certain evidence offered by appellants or in its other evidentiary rulings?

¹In this brief the Clerk's Transcript of Record is cited as "R", followed by the page number. The transcript of the trial is cited as "Tr". Transcripts of Depositions are cited as "Dep. Tr." Exhibits admitted in evidence are cited "Exh.", and exhibits identified but not admitted in evidence are cited "Exh. Id." Appellants' Brief is cited as "Br. Appel." and the Specification of Errors as "Spec."

C. Did the trial court err in its pretrial rulings which (1) set the limits of discovery, (2) specified the issues to be tried, and (3) ordered that the issues of liability and damages be separately tried?

D. Did the trial court erroneously tax certain items of costs against appellants?

This brief deals chiefly with Questions (A) and (B) above. Question (C) is treated only with respect to the rulings on discovery, and Question (D) is not dealt with at all. The matters not discussed in this brief are fully analyzed and argued in the briefs of other appellees, and appellant respectfully asks the Court to consider those discussions as adopted in this brief.

II. Introduction

The complaints charged that appellees, who are manufacturers, distributors and retailers of television sets and free standing major household appliances,² conspired to restrain or monopolize interstate commerce in the sale of such goods in the San Francisco market, and, pursuant to such conspiracy, prevented appellants from obtaining such goods. The appellants are United Shoppers Exclusive (U.S.E.), the owner of a retail establishment on Alamy Boulevard in San Francisco, and Manfree, Inc., the major appliance and television concessionaire to whom U.S.E. leased space in its store. The period covered in the complaints was March 1957 to August 1964. R. 1; R. 15.

General Electric Company was sued through its General Electric Major Appliance Division, which manufactures General Electric Brand television sets and major appliances and distributes them to retailers in the San Francisco Bay Area; and through its Hotpoint Division,

²Free standing appliances are contrasted with built-in appliances; the distribution of built-in appliances is not involved. Free standing appliances are frequently referred to as "white goods."

which manufactures Hotpoint brand major appliances and manufactured Hotpoint brand television sets for a short time at the outset of the period covered by the alleged conspiracy. The plaintiffs also sued Graybar Electric Company, Inc., the independent distributor through which Hotpoint products were sold to retailers in the San Francisco Bay Area.

The Major Appliance Division and the Hotpoint Division are each autonomous divisions of General Electric Company which at all relevant times manufactured and marketed their products independently of one another. Accordingly, this Statement of the Case will discuss, in turn:

(A) "General Electric" evidence, relating to General Electric brand merchandise manufactured by the General Electric Major Appliance Division headquartered in Louisville, Kentucky and distributed in the San Francisco Bay Area by the Burlingame Branch of the Northern California District of that Division.

(B) "Hotpoint" evidence, relating to Hotpoint brand merchandise manufactured by General Electric's Hotpoint Division headquartered in Chicago, Illinois, and distributed by the San Francisco office of Graybar, the independent distributor.

III. Statement of General Electric Evidence

A. General Electric Contacts With Appellants

The Major Appliance Division has never sold any of its General Electric brand merchandise to appellants. Tr. 5845, 5846. Contrary to appellants' claim that this failure to sell was in furtherance of a conspiracy with others, the facts established conclusively that the Major Appliance Division, which was enjoying excellent market penetration in the distribution of its product line, decided for substan-

tial, independent business reasons not to deal with appellants, unproven newcomers to the scene. Moreover, this decision was reached without consultation, communication or contact of any sort with any other appellee, or alleged co-conspirator, and without knowledge on the part of the Major Appliance Division of any demands by appellants for competing product lines or of refusals to sell pursuant to such demands.

The Major Appliance Division maintained its own distribution of white goods and television in the Bay Area, through its Northern District headquarters at Burlingame. This distribution was inherited in October 1956 from the General Electric Supply Company, another autonomous component of the company (Tr. 4188, 4189), which thereafter engaged in distribution of traffic or small appliances and radios. Tr. 5291-92.

On the Major Appliance Division's assuming the distribution of General Electric white goods and television, a program of selectivity of appointment of franchised retail dealers was instituted, with the number of retail dealers in San Francisco reduced by 1958 from 50 to approximately 25. Tr. 4190-4192. This was the decision of Mr. H. P. Gough, District Manager of the Appliance Division, reached before appellants had even commenced business operations and with no knowledge whatever of their operations. It was based on his determination that there existed a relatively static market for free standing white goods in San Francisco, demanding aggressive selling of the full line with accent on customer service, advertising, training, display, and proven ability in the community. Tr. 4191-4192.

Judging by market penetration the policy of selectivity in dealer franchising was successful, with General Electric enjoying a better market penetration with fewer dealers on the bulk of its product line. Tr. 4192.

With a program of selectivity, obviously some dealer applicants are disappointed. In fact about 90% of those applying were refused franchises. Included among these was Manfree.

U.S.E. operated a "closed door" operation, open only to those holding membership cards. As appellants' brief states, it was an operation characterized by "minimum overhead." Br. Appel. 2. General Electric representatives were unimpressed with the warehouse atmosphere, the confined space, the stocking of merchandise in cartons and poor display. Tr. 5222, 4354, 4396. U.S.E.'s earlier concessionaire handling white goods and television had failed financially. Obviously when the objective is selectivity based on proven success, coverage of the full line, display, salesmanship and service to the customer, a decision by General Electric not to franchise Manfree was not unpredictable.

The first encounter between the Major Appliance Division and appellants was brought on by a telephone call in November 1958 from Mr. Alpine, then President of Manfree, to Mr. Bernard Meseth, then Manager of Dealer Sales for the Burlingame Branch. Tr. 5193. Mr. Meseth visited the store and had lunch with Mr. Alpine and Bernard Freeman, the Vice President of Manfree, who requested the General Electric franchise. Tr. 5219. Mr. Meseth advised that General Electric already had a strong dealer structure in San Francisco and had no plans to add to it at that time. *Ibid.* He observed the warehouse atmosphere, inadequate floor space and sales force, on which he reported at a subsequent meeting with those in charge of distribution in the northern California district, Mr. Gough and Mr. Hobson. It was decided that General Electric should not franchise Manfree at that time, and no franchise was awarded. Tr. 5221, 5222, 4155, 4157, 5237.

Again in July of 1960, following receipt of a letter from Mr. Alpine requesting authorization to carry General Electric merchandise, see Exhs. 509-513, Mr. R. P. Swanson, then Manager of Dealer Sales at the Burlingame Branch, directed Mr. William Lau, a General Electric sales counselor, to contact Mr. Alpine at the U.S.E. store. Tr. 4349-50. Mr. Lau made such a call but was unable to get into the U.S.E. store premises and his view was blocked by a stack of television cartons in the front doorway. Tr. 4354, 4396. He met Mr. Alpine and Mr. Freeman at the U.S.E. business office, and received a request for a franchise. Lau advised that there was none available at that time. Tr. 4354.

B. General Electric and the Alleged Co-Conspirator Retailers

At various times the Major Appliance Division sold General Electric brand merchandise to certain well-established retail dealers in San Francisco, now claimed to be co-conspirators. See Exh. 148-A. The evidence of the relationship between General Electric and these retailers is exactly what one would expect; that is, it concerns the supplying of General Electric products and their display and promotion for sale by these retailers. Tr. 4136, 4142-44; 5183-84.

There is no evidence that any retailer in San Francisco ever discussed with General Electric the "who, what, when or wheres" of franchising other retailers in the San Francisco area. Each and every retailer examined on the subject flatly denied any request to General Electric not to franchise Manfree (Hobbs at Tr. 445; Sanford at Tr. 1337; Thomas at Tr. 1361; Shreck at Tr. 1770; Fuller at Tr. 1871). The testimony on the subject by General Electric witnesses was equally unequivocal. Mr. Harry Gough, then in charge of General Electric franchising in the area, and Bernard Meseth each testified that there was no communication with any retailer concerning appellants' requests for a General Electric franchise or any other matter remotely

related to appellants' charge of conspiratorial boycott. Tr. 4194, 4197, 5297. There was no discussion with any retailer concerning the franchising of so-called closed-door or discount house operations. Tr. 4194-95; 4198-99; 4392-98; 5296-98. No retailer even knew that appellants were requesting products from General Electric, or that General Electric had called on appellants. Tr. 5297. Nor was the decision whether to franchise Manfree discussed with any other component of General Electric; it was ultimately the decision of Mr. Gough. Tr. 5262-65.

Appellants seemingly infer, in their brief under the caption of "joint and collaborative action between the retailer defendants" (Br. Appel. 62, 68) that because Meseth spoke of General Electric's fine dealer structure (Meseth at Tr. 5219; Freeman at Tr. 5842-45) in declining appellants' request for a franchise, and acknowledged that "at any time we add to our dealer structure there is an element of risk [as to sales to other retailers generally]" (Tr. 5265), this is evidence of a conspiracy between General Electric and the alleged co-conspirator retailers in this case.³ Such a contention is absurd on its face. Obviously distribution management has the right to determine for itself whether to franchise a large or small number of retailer outlets; it is self evident also that increasing the number of retailers may affect the volume of sales to established retail outlets.

C. General Electric and Alleged Co-Conspirator Manufacturers and Distributors

Mr. Gough (Tr. 4194-98) and Mr. Meseth (Tr. 5263-64, 5292-98) confirmed that the decision whether or not to

³This is the only evidence referred to by appellants relating to General Electric under this caption of their brief, save for some discussion of newspapers. There is not a shred of evidence that General Electric at any time had any contacts with any newspapers on any subject. For this reason General Electric in this brief will not further treat the assertions of appellants concerning newspapers.

franchise appellants was the decision of the Northern California District, and was not discussed either before or after it was made with any competing distributor or manufacturer. Nor were merchandising philosophies discussed with competition. Tr. 5298.

The record is devoid of any communications between General Electric and a competing distributor or manufacturer. There is no evidence that the persons responsible for selecting General Electric franchised dealers in the Bay Area had any discussions or exchanged any correspondence on any subject with any person having to do with the distribution of Frigidaire, Maytag, Hotpoint, RCA, Whirlpool or Norge brand products.

General Electric was a member of certain trade associations; namely, NEMA, AHLMA, and EIA. Such memberships provided General Electric a means to determine the extent of its market penetration in a given area. The mechanics were simple. Each member reported to the association the number of units sold of a given product and received periodically in return the total number of units of that product sold by all association members in the market area. There was no evidence that General Electric was ever supplied the market penetration of any other member. Nor was there any exchange of dollar information, as reporting was done in terms of units. See Exh. 149, an illustrative penetration analysis prepared by General Electric for its own use; Tr. 5281-82; Exh. 5048 (General Electric analysis based on AHLMA statistics); Exh. 5049 (General Electric analysis based on EIA statistics).

D. Retail Prices and Advertising of General Electric Brand Products

Attempting unsuccessfully to conceal the glaring defects in their case, appellants devoted an inordinate amount of trial time to matters concerning the pricing and adver-

tising of various brands of white goods and television which do not bear even peripherally upon any alleged conspiracy. These excursions led nowhere at the trial, and appellants have not succeeded in conducting them to an alternate destination by retracing the same steps in their brief. The following discussion is included principally to correct the most dire inaccuracies and misstatements employed by appellants in their circular journey.

1. Appellants' assertions concerning advertising practices and suggested list prices

Appellants assert that the manufacturers' published "price lists * * * with list (or retail) prices shown thereon" (Br. Appel. 28, 105, 123) and that the distributors based their retail prices thereon (Br. Appel. 28, 123), the distributors "requiring" their retailers to advertise at these prices under penalty of not receiving their advertising allowances (Br. Appel. 78, 92, 123).

As to General Electric the only foundation for these extravagant assertions is that General Electric published price lists which contained not only the cost to the retailer, but also a "suggested retail price" which the retailers were free to follow or not. Tr. 5223. The record is clear that in some cases the retailers followed this price and in others they did not. Tr. 5223, 1431-32, 1450, 2352-53. Every other stanza of this incantation in appellants' brief is either inapposite to the General Electric distribution system or directly refuted by the record.

The Major Appliance Division handled its own distribution of General Electric brand products. Any price sheets used by General Electric were promulgated directly to retailers without any advice or assistance from any third parties.

Nor was there any evidence that General Electric's "suggested retail price" was anything more than a sug-

gestion. The uncontradicted testimony that General Electric never required its retailers to advertise at suggested list, and at no time conditioned its advertising moneys on advertising at suggested list, was confirmed by the retailer witnesses Thomas at Tr. 1532; Sanford at Tr. 729-30; and others. Meseth of General Electric testified that retailers sometimes followed suggested list in their advertising and sometimes did not, Tr. 5223, with advertising at suggested list not a condition of receiving cooperative advertising moneys. Tr. 5225.

Appellants base their contrary assertions on Exhibits 714, 717 and 708. Br. Appel. 34. Exhibit 714 contains no statement concerning "suggested retail price" or any price whatsoever. It is a denial of a Hale's advertising claim because of General Electric's policy that cooperative advertisements be authorized in advance by General Electric. This is obviously a reasonable means for establishing compliance with conditions of General Electric's advertising programs designed to insure equal treatment to all, to protect trademark interest and to protect against false and misleading claims. See Tr. 5225, 5248. Exhibit 717 is in the same category. It likewise makes no mention whatsoever of prices or price policy. This Exhibit is a partial denial by General Electric of a Hale's advertising claim exceeding the amount to which Hale's was entitled under policies providing for equal treatment to all. See Tr. 5248, 5293. Had General Electric not limited Hale's to proportionately equal treatment by denying the claim, appellants would be arguing the allowance of excessive advertising funds.

Nor does Exhibit 708 evidence any price restriction on advertising funds. This letter from a General Electric sales trainee to Hales states the obvious fact that, in 1961, Hales was free as a practical matter from any market influences upon its pricing of an outmoded 1957 model refrigerator (an LJ12 refrigerator being a 1957

model; see Tr. 5348), of which Hales had all the remaining models in the area. *Ibid.* Even the most antithetic economists would unite in this conclusion.

There are implications in appellants' brief that General Electric participated in a scheme requiring affidavits or similar certificates of proof from its retailers to show selling at suggested list price. At page 108 it is stated that "The practice of requiring retailers to report, under oath, the prices at which appliances are sold by them pursuant to a trade association's promotions, was followed and enforced by appellees GE, * * *." Another ominous note of price maintenance is sounded with the statement that "GE, Maytag and RCA required retailers to sign affidavits that they had engaged in no comparative price advertising." *Ibid.*

These arguments are an extension *ad absurdum* of the facts in the record. Exhibit 2090, to which appellants refer for proof that retailers were required to report their prices under oath, is a report of a Northern California Electrical Bureau (N.C.E.B.) meeting on January 29, 1959, and a then current Pacific Gas & Electric promotional campaign exhorting housewives: "Don't be a dishwasher. Buy one." Prizes were awarded to participating dealers who sold the most dishwashers. The planners of the promotion did not wish to award equally the seller of a \$100 dishwasher and the seller of a \$200 dishwasher, so a minimum value was established for sales which would qualify under the promotion. Suggested retail price was a suitable yardstick for comparing the value of competing brands, so participating dealers making claims for payment were asked to state the manufacturer's suggested retail price for the dishwasher. The dealers were not required to state the price at which the dishwasher was actually sold or to verify that it was sold at suggested retail price. Tr. 980-83. The chasm between

this evidence and the claims appellants make for it is too vast to warrant further comment.

As for the affidavits concerning "comparative price advertising"⁴ the uncontradicted evidence was that if General Electric required them at all, it was to ensure observance by its retailers of "truth in advertising" requirements established by the Federal Trade Commission. Tr. 5225-5228.

2. "Discrimination in Pricing"

"Price discriminations to retailers" is another of the signposts we encounter on appellants' "magical mystery tour". The claim is made that "most of the distributors" adopted a policy of publishing "coded" price sheets, providing different purchase prices to different retailers and false discounts to favorite dealers (Br. Appel. 29), that discriminatory terms in the purchase of goods were "established by direct evidence, between such vendors and Hale" (*Id.* at 93), and that "vendor appellees and co-conspirators treated Hale [and the other alleged retailer conspirators] as 'key' accounts, allowing them special price lists * * *" *Id.* at 106.

At no time did General Electric provide coded or special price sheets to any dealers. Tr. 5295-96. There is not a whit of evidence that it did. Nor did it offer volume discounts other than to all retailers on equal terms. Appellants in their brief have detailed no evidence to support such a claim against General Electric. No such evidence exists. See Tr. 5280, 5296.

⁴The term "comparative price" has nothing to do with inter-brand price comparisons. It refers to comparisons of the "now" price with the "was" price of a particular brand.

3. "Special Advertising Funds"

Appellants assert that the "manufacturers made available large advertising funds to selected dealers", (Br. Appel. 30; see *id.* at 37, 79), that "key" retailers enjoyed special advertising rates, (*id.* at 31, 93, 106), and that Hale's was a "key advertiser" for General Electric. *Id.* at 113. General Electric allegedly allowed Hale "100% paid advertising". *Id.* at 41. Appellants' zeal in urging these claims at trial was unflagging, despite their lack of any real relevance to the conspiracy charged. The passing of time has only quickened appellants' ardor.

These assertions seek to imply favoritism by General Electric to Hale's or other selected dealers. The implication is false and unsupported by the record. The facts are clear that no preferences were given. The retail witnesses questioned on the administration of the General Electric advertising program denied any preferential treatment. Tr. 730-37, 816-17. The General Electric witnesses likewise denied the charge. Tr. 4393-95, 5292-93, 5334, 5343, 5355.

The General Electric advertising programs were described by Mr. Meseth, Advertising Manager for the Northern California District from December 1959 to July 1961. To promote local advertising, General Electric adopted and administered cooperative advertising plans, whereby General Electric would generally bear a portion of the publisher's listed advertising rate (the portion being referred to by General Electric as its flat rate, Tr. 5230) on the basis of credits earned by the retailer through its volume of purchases. Tr. 4395. Each retailer, large or small, was entitled to payment by General Electric for so many lines of advertising at the flat rate; *i.e.*, on a proportionately equal basis, depending upon the volume of his purchases. Tr. 5293. Frequently special promotion campaigns were featured by General Electric under

catchy titles such as "spotlight promotion", see Exh. 712, to induce greater dealer participation. In such cases, General Electric offered to pay all its retailers a higher percentage of the listed advertising rate than the normal "flat rate". These "special flat rates" could increase to as much as 100% of the publisher's listed advertising rate, the extent of the offer still being determined, however, by credits earned according to the number of units purchased by the retailer of the particular appliances being promoted. Again the offer was made on a proportionately equal basis to all. Tr. 5345, 5347, 5355-56.

The exhibits cited by appellants in their brief (Exhs. 708, 712, 713, 715 and 717; see Br. Appel. 41, 113) to evidence special advertising consideration to Hale's contain no such evidence. Exhibit 708, already discussed, deals only with the sale to Hale's in September 1961 of General Electric's remaining inventory of a 1957 model refrigerator. This was not a special model for Hale's and was offered to all dealers. Tr. 5349.

Exhibits 712 and 713 are illustrations only of General Electric authorizations to Hale's for advertising allowances, at special higher rates available to all during special promotional campaigns. Exhibit 717, also discussed above, is a General Electric letter evidencing only its continuing efforts to administer the cooperative advertising program on a proportionately equal basis to all.

Exhibit 715 concerns a slightly different advertising program. Occasionally General Electric announced "dealer listing programs" enabling subscribing dealers to be listed as a participating retailer in advertisements run by General Electric directly in a given market area. This program was open to all, on equal terms, Tr. 5278; 5342-5343, and Exhibit 715 merely corroborates Hale's participation during the year 1960. Tr. 5343.

Other attempts by appellants to weave a thread of favoritism through the fabric of a non-discriminatory advertising program were equally unsuccessful. There was no difference in funds available to a dealer, whether he was large or small. Tr. 4393. A dealer could advertise in any media he chose. Tr. 4394. He could have an in-store promotion or a backdoor sale. Tr. 4395, 5246, 5248. The principal thing required of a dealer was that he confirm to General Electric that the funds had been spent, with the advertising monies available being limited by the volume of purchases. Tr. 4395.

IV. Statement of Hotpoint Evidence

A. The Marketing of Hotpoint Products in the San Francisco Area

At no time during the relevant period did General Electric's Hotpoint Division sell any of its Hotpoint brand white goods⁵ or television to retailers in the San Francisco area. All Hotpoint sales were to Graybar Electric Company, Hotpoint's independent distributor for the area. Tr. 3045, 4426-27. Exhs. 31-34. Hotpoint had no reason to change its well established method of distribution in order to sell directly to appellants.

Hotpoint and Graybar carried on business contacts which were the normal concomitant of their common interest in promoting the sale of Hotpoint products in the San Francisco area. Tr. 3091. These contacts in no way detracted from Graybar's position as an independent distributor which established its own pricing, advertising and marketing policies for the products it distributed. Tr. 3087-90, 3277-79. Graybar is a nationwide concern, Tr. 3045, distributing appliances manufactured by competitors of Hotpoint in other areas (for example, Norge products in Los Angeles, Tr. 2916), and numerous products other than

⁵Free standing major appliances.

Hotpoint in the San Francisco area. Tr. 3267. It was by no means an alter ego or hip pocket operation of Hotpoint.

Appellants' efforts to show that the relation between Hotpoint and Graybar exceeded the dimensions of that between a manufacturer and its independent area distributor fell far short of the mark. Dealer record cards which Graybar used to notify the Hotpoint Statistical Department that a retailer had been newly franchised or that his franchise had been cancelled were introduced in evidence. Exhs. 4188, 4189, 536-C. No testimony or other evidence was produced tending to show that these notices represented anything other than *post facto* notification by Graybar to Hotpoint of steps already taken by Graybar, without advance consultation or approval from Hotpoint. See Tr. 4443-45. Likewise, there was no evidence that Hotpoint ever took any *post facto* steps respecting these decisions, except to congratulate Graybar on appointing Hale Brothers as a dealer in April 1961, some 2½ years after the alleged conspiratorial termination of Manfree took place. See Exh. 638.

Graybar also supplied Hotpoint with statistical reports of total unit sales of various Hotpoint products made by retailers. Tr. 3055-57, 3075-76, 4436-37. See Exhs. 13, 4267, 4268. Hotpoint received reports only of total units sold and received *no information* as to either unit price or dollar volume. Tr. 4436, Exhs. 4267, 4268.

The repeated assertion by appellants that Hotpoint maintained suggested retail prices is belied by uncontradicted testimony that Hotpoint abandoned suggested prices in 1958 and never resumed their use. Tr. 3278. There was no evidence that Hotpoint had knowledge or participated in any way in the suggested retail prices published by Graybar, see Tr. 3093, or the Graybar practice of conditioning advertising monies disbursed by it

on the advertising of Graybar's suggested list prices if a price were to be advertised. Tr. 3277.

Appellants' monotonous battle cry of "special advertising funds" fails to rally any facts to show favoritism by Hotpoint to a particular retailer. While in their brief, as at trial, appellants assume rather than persuade one of the relevance of such matters, the subject will be briefly treated.

Appellants do not dispute what is incontrovertible, namely, that Hotpoint never made *any* advertising funds available directly to any retailer in San Francisco.

To be sure, Hotpoint made advertising funds available to Graybar. Tr. 3088. At this threshold, appellants' argument and the evidence go their separate ways. Hotpoint contributed these funds on the basis of $1\frac{1}{2}\%$ of Graybar's purchases of Hotpoint products. Tr. 3089. Graybar matched the funds and spent the money for local advertising in cooperation with its participating retailers. Tr. 3088. Graybar alone decided how the funds were to be spent and to whom they were allocated. *Ibid.*, Tr. 3090, 4439. The policies under which the funds were expended were developed by Graybar, without Hotpoint's participation, approval or knowledge. Tr. 3086-87, 3277-79. Hotpoint had no policies of its own regarding these expenditures, except that the funds be made available on an equal basis to all retailers. See Exh. DGE 8345-G; Tr. 3281. In fact, it generally had no knowledge of how they were spent or to whom they were allocated by Graybar. Tr. 4439-40.

Graybar occasionally requested, and Hotpoint occasionally extended, additional advertising funds for special promotions of particular products. Tr. 3094. Hotpoint acquired some knowledge as to the use of these funds, either from program requests which Graybar submitted or from newspaper tear sheets or other indications of

actual use that Hotpoint sometimes requested of Graybar. Tr. 3220. In most cases, Hotpoint made no such request. *Ibid.*, Tr. 4439. Any such requests were a reasonable check employed to determine that the funds were employed for the promotions requested.

These facts conclusively refute any inference that Hotpoint discriminated in favor of any retailer in its distribution of advertising funds to Graybar. Hotpoint neither directed nor conditioned the distribution of any funds disbursed by it to Graybar, except to request equality. To imagine that a conspiracy to do anything could be constructed on this erratic basis is indeed a mental *tour de force*, but hardly one generated by reason.

B. Hotpoint and Appellants

The evidence in this case was that the only contacts between Hotpoint and appellants consisted of:

a) a routine promotional call by Orville Ransom, a sales representative of Hotpoint employed in the Bay Area until December of 1957, at the store premises of Manfree in 1957, while Manfree was franchised by Graybar. Tr. 4429-32. Ransom left the Bay Area in December of 1957, to be stationed until November 1958 with Hotpoint in Portland where Hotpoint carried on its own distribution. Tr. 4428, 4443. There was no evidence that Ransom had any knowledge of Graybar's decision to terminate Manfree in October 1958, or communicated in any manner with anyone on any subject related to the franchising of Manfree or the termination of its franchise by Graybar, or his visit to Manfree. Tr. 4430-32, 4445-46. When Ransom was in Portland there was no representative of Hotpoint in the Bay Area. Tr. 4475.

b) Hotpoint was on the receiving end of appellants' form demand letter for product in June 1960 (Exh. 537), six weeks before it was sued, and again subsequent to the

initiation of litigation (Exh. 538). As Hotpoint was not engaged in retail distribution in San Francisco, there was no reason for it to alter its distribution practices in the case of Manfree.

C. Hotpoint and the Alleged Co-Conspirator Retailers

No significant contacts between representatives of Hotpoint and any of the retailers alleged to be co-conspirators were shown by the evidence.

During the period prior to December 1957 when Ransom was employed by Hotpoint in San Francisco as a sales representative, his duties were to "show the flag" of the Hotpoint line to the various franchised retailer dealers of Graybar. See Tr. 4429-30. While he presumably called upon Macy's, the only alleged co-conspirator franchised at that time by Graybar,⁶ no Macy's witness appeared at the trial and Ransom was not questioned about any conversations with Macy's, so the record is devoid of evidence of any communication exchanged between any alleged co-conspirator retailer and any Hotpoint representative on any subject during the period in which appellants were franchised by Graybar.

Faced with this vacuum, appellants attempt to give some sinister significance to the get-acquainted visit to San Francisco of the then newly appointed Manager of the Hotpoint Division, and Vice President of General Electric, William L. Wichman. By deposition Mr. Wichman testified of his appointment as Manager in May or June of 1958, and described a visit at some time thereafter throughout the entire west coast in connection with the assumption of his duties. While in San Francisco he recalled meeting some retailers, stating he was always interested in meeting retailers and impressing them with the desirability of the Hotpoint line. He recalled no dis-

⁶Exh. 4268.

cussion concerning U.S.E. and never discussed with Hotpoint management the question of whether or not U.S.E. should be franchised. Tr. 5420-21, 5449. The only retailer which Wichman could specifically recall was Macy's. Tr. 5417. No retailer witness at the trial testified to any meeting with Wichman. Lest appellants attempt to distort a chance meeting with a Macy's representative into evidence of conspiratorial conduct pointed toward U.S.E., it should be noted that Macy's was franchised by Graybar for Hotpoint products both before and after the termination of Manfree, with Macy's sales of the Hotpoint line being substantially better during the period of Manfree's franchise than after Manfree was terminated. Exh. 4268.

Following the decision of William H. Mayben, the Appliance Manager for Graybar, to terminate Manfree, Ransom did return to the Bay Area stationed in San Mateo as a representative of Hotpoint, but in a different capacity, namely, as marketing representative of the entire western region of the United States. Tr. 4428. There was no evidence of any communication exchanged between Ransom and any alleged co-conspirator retailers on his return. In fact the witnesses representing retailers who carried the Hotpoint line under Graybar franchise subsequent to his return could not recall meeting a representative of the factory at any time. Thomas of Hale's at Tr. 1461; Schreck of Sterling at Tr. 1701; Laird of Lachman at Tr. 1922; Tobin of Sterling at Tr. 2215. This is understandable in view of the large "circuit" which Ransom then covered, and the fact that he would probably call on floor salesmen rather than retailer management.

D. Hotpoint Relations With Alleged Co-Conspirator Distributors and Manufacturers

There is no evidence of any exchange of communication between Hotpoint Division of General Electric and a dis-

tributor or manufacturer of a competing product line. The record shows only that Hotpoint, like certain other manufacturers, had a representative who occasionally attended local business association meetings of the NCEB. All witnesses questioned on such meetings denied any discussion of franchising U.S.E., or any subject related thereto. *E.g.*, Tr. 919-20; 985; 3131; 3142, 4063-71.

E. The Circumstances of Graybar's Termination of the Manfree Franchise

Manfree had held a franchise from Graybar as to Hotpoint brand white goods and television commencing in May of 1957, of which Graybar duly notified Hotpoint. Exh. 536. For reasons to be noted, Mayben, the District Appliance Sales Manager of Graybar, decided to terminate this franchise in the fall of 1958, by notice of cancellation dated October 28, 1958. Exh. 525.

The circumstances of Graybar's termination were these: William Mayben had been appointed District Appliance Sales Manager for Graybar in April of 1958, when sales were slipping. Tr. 3268. He became aware that Graybar had a considerable number of dealers who were not doing an adequate job in increasing market penetration or giving full line support to Hotpoint products, these dealers including Manfree, whose principal strength earlier had been in the sale of the television line which was to be discontinued by Hotpoint. Tr. 3270-71. Manfree sales of Hotpoint brands had declined in 1957, and were further declining in 1958, particularly in laundry equipment, where Mayben felt help was particularly needed.⁷ These

⁷As shown by Exhs. 4267 and 4268, the 1957 and 1958 unit sales reports by Graybar to Hotpoint, 1957 sales by Manfree of white goods were 293 and of television, 189, for seven months of operations. In 1958 for the full 11 months during which it held the Graybar franchise, Manfree sales had dropped to 150 white goods and 35 television, with but 11 of laundry equipment.

matters were discussed with Mayben's superior, G. L. Call, Graybar's District Manager, and together they weeded out approximately 15 to 20 dealer franchises in the San Francisco area which were not meeting the sales and promotional standards considered essential for Graybar to increase its market penetration for Hotpoint products. Mayben testified that this decision concerning the Manfree cancellation was his and his alone, and was not discussed with anyone outside of Graybar, including anyone from Hotpoint-General Electric. Tr. 3272, 3266.

As earlier noted, while Hotpoint had maintained a sales representative in San Francisco (Orville Ransom) during the period October 1956 to December 1957, there was no Hotpoint office open in the San Francisco Bay Area from December 1957 to November 1, 1958. Tr. 4475. The fact that Manfree was terminated by Graybar did not come to Ransom's attention while he was in Portland and he was not notified of it before it happened. Tr. 4445-46. The evidence therefore fails to establish any participation by Hotpoint in Graybar's decision.

Graybar's franchising of other retailers does not support appellants' hypothesis of conspiratorial activity engaged in with these retailers. As noted earlier, Macy's was franchised both before and after Manfree's termination, with its sales not increasing (as appellants would infer) after the Manfree termination, but rather decreasing. A second retailer, Redlick-Newmans, never held a Graybar franchise. Hale's was franchised in April of 1961, totally removed in time and business context from the Manfree termination. See Exh. 638; Tr. 3167-68. Lachman and Sterling franchises were not granted until eight and ten months respectively after the Manfree termination. See Exhs. 4188-B, 4189.

V. Summary of the Case in General

To this point, this statement of the case has mainly been a comparison of the record with the unsupported and exaggerated statements in appellants' brief concerning the operations of General Electric and Hotpoint. This approach, however necessary in the circumstances, does not adequately direct the Court's attention to the major flaws in appellants' case. This action was brought under the Sherman Act and alleges an illegal conspiracy, combination or agreement to boycott appellants and prevent them from obtaining major brands of television sets and household appliances. It is not an action claiming unlawful price discriminations or discriminatory advertising allowances. Over the objections of appellees, most of the trial was consumed in examining questions such as whether a particular distributor of television or appliances did or did not afford a particular retailer (with appellants' attention seemingly centered on Hale's) discounts or advertising allowances that were not equally available to other retailers.

General Electric insists that there is no evidence to support a finding that it discriminated in any manner in favor of Hale's or any other retailer and that the record conclusively establishes no favoritism existed. See pp. 13-16, *supra*. Even if some favoritism were shown, however, it would not support a finding that General Electric and Hale's (or such other favored retailer) conspired to boycott Manfree. On this central issue of a conspiracy to boycott, there is no evidence whatever.

Nor does the record show "conscious parallelism". In the case of General Electric, there is no evidence that either the Major Appliance or Hotpoint divisions knew of any decisions made by those in charge of distributing Norge, Whirlpool, RCA, Hotpoint, Maytag or Frigidaire not to franchise Manfree. At the time of Bernard

Meseth's visit to U.S.E. on behalf of General Electric-Major Appliance Division on November 5, 1958, Manfree was still stocking and buying Maytag, whose franchise expired by its own terms in March of 1959 (Tr. 3375; Exh. DMT 13143; Exh. 1523), and held Hotpoint products in stock, since Graybar had just notified appellants of its decision to terminate. See Exh. 525, dated October 28, 1958. It was stocking the Admiral line. There is no evidence that either Mr. Freeman or Mr. Alpine discussed with Mr. Meseth any of their conversations with Lancaster representatives concerning the Norge line, or Graybar representatives concerning the Hotpoint line,⁸ or California Electric representatives concerning the Philco line. Similarly, there is no evidence that at that time appellants had made demands upon Frigidaire, A. H. Meyer Co., Whirlpool or RCA, so that Meseth could not have known of any refusals to deal by them.

Hotpoint was totally incognizant of Manfree's business relations with any other distributor. No Hotpoint representative visited appellants except for Mr. Ransom, who did so in 1957 when appellants were buying and selling the Hotpoint brand as well as several other brands. Hotpoint received no report of this visit.

The record likewise shows no relationships between retailers and their distributors involved in this appeal which could conceivably evidence an agreement not to franchise U.S.E. Obviously, retailers and their particular distributors engage in some interchange concerning business matters. But there is no evidence that such communications ever assumed the character of concerted agreement between a retailer and the supplying distributor not to deal with appellants.

⁸Meseth recalled that Freeman had advised him of being terminated by an unidentified distributor, for which it was going to "pay dearly". Meseth considered this threat a weak foundation on which to embark upon a business relationship. Tr. 5218.

Much trial time was spent on whether particular distributors conditioned advertising allowances on suggested retail price being advertised if any price were to be advertised. The evidence showed great disparity in the distributors' practices. Some, like California Electric and Graybar, did announce such a policy to their franchised retailers. Others, including General Electric, never imposed such a condition. Others, such as Frigidaire after 1960 and Hotpoint after 1958, did not even have suggested list prices. This evidence concerning administration of cooperative advertising funds is not a basis for a reasonable inference of any illegal conspiracy to boycott Man-free.

The record, therefore, is worth discussing as much for what it does not show as for what it does. It does not show any of the elements required for proof of an unlawful conspiracy or agreement. It does not show parallelism among the defendants, nor a consciousness of parallelism, nor of commitment to a common unlawful scheme. It shows only competing distributors concerned with achieving the highest possible market penetration for their individual product lines and following autonomous marketing policies in an effort to realize this goal.

SUMMARY OF ARGUMENT

The trial court's ruling directing a verdict in favor of appellee General Electric Company was eminently correct. There was no evidence that either the General Electric Major Appliance Division, which elected not to sell appellants because of its fine existing dealer structure and market penetration, or the Hotpoint Division, which elected not to sell any retailer in the San Francisco area, were acting pursuant to any conspiracy. There is no factual or legal basis for charging Hotpoint with partici-

pation in a conspiracy through its independent area distributor, Graybar Electric Company. There was no evidence of any kind of conspiracy not to sell appellants.

The trial court committed no prejudicial error in excluding certain documentary evidence offered by appellants against General Electric Company or in its other rulings on evidentiary matters affecting General Electric.

The pre-trial rulings of the court which limited certain of the appellants' excessive and repetitive discovery demands against General Electric were correct.

ARGUMENT

I. THE COURT CORRECTLY DIRECTED A VERDICT FOR GENERAL ELECTRIC AND THE OTHER APPELLEES BECAUSE THERE WAS NO EVIDENCE OF A CONSPIRATORIAL REFUSAL TO DEAL

Appellants do not question the basic principle that an independent refusal to deal with another, for whatever reason, is not a violation of the antitrust laws. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 63 L. Ed. 992, 997 (1919). The evidence showed nothing other than the exercise, at various times, in various fashions and for various business reasons, of this basic right.

Management decisions on product distribution are complex ones. As the evidence showed, it is by no means a simple case of offering the product to the maximum number of retail outlets. Decisions as to the nature and number of retail outlets are influenced by many factors, including the type of product and the nature of the market. Light bulbs are merchandised differently from an appliance requiring a major investment. Salesmanship, service and a community reputation of long standing play an insignificant role in retailing light bulbs. Conversely, these

factors are of prime importance in merchandising a major appliance. The appliance customer wants to be certain that the retailer will provide him the follow-up service that might be required, and, because the stakes are much larger, more time and expense are spent to convince the customer to choose one appliance over another. The testimony at trial exemplified the differing influence of such factors upon the sale of small appliances, such as toasters and radios, as compared to television sets and major household appliances. Tr. 4196-98, 5292.

The nature of the market is also significant. In an expanding market, a seller may gamble with a greater number of retail outlets to seek a higher market penetration, while in a restricted or declining market, concentrated selling techniques become more important. Where various products are in competition within such a market, as in this case, see Tr. 4192, it becomes more important for the distributor of each product to have retail outlets that will promote that product in preference to another brand. The record is replete with illustrations of the devices employed by the various distributors to increase their penetration of this market at the expense of their competition.

Manufacturers or independent distributors are not compelled to resolve these choices of retail outlets in favor of new and unproven types of merchandisers, let alone to select particular franchise applicants, upon pain of violating the antitrust laws if they do not. *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F. 2d 797, 798-99 (4th Cir. 1951).

At the time of Manfree's demand for a General Electric franchise, General Electric had excellent market penetration through carefully-selected dealers who were selling the General Electric product in attractive surroundings, promoting the General Electric line in preference to com-

peting lines, and enjoying a good reputation for customer service and satisfaction. In sum, General Electric was employing established retail outlets with marked success. It was not required to experiment with a new and untried type of appliance and television retailer such as appellants, featuring "low overhead" (Br. Appel. 2) and similar types of customer inducements.

Appellants appear to employ "dealer structure" as an attempted synonym for an unlawful agreement between a distributor and one or more of its retailers. The law does not permit the type of inference embodied in this arbitrary equation. If recognition of the risk element inherent in any addition to dealer structure was enough to establish an unlawful agreement not to franchise a particular applicant, cases would be decided purely on abstract speculation. This is hardly the law:

[P]laintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence, [but] he must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.

Independent Iron Works, Inc. v. U. S. Steel Corp.,
177 F. Supp. 743, 746 (N.D. Cal. 1959) aff'd 322
F. 2d 656 (9th Cir. 1963) cert. denied 375 U.S.
922 (1963).

Distributors have the right to be selective and to restrict the number of their retailers: *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 18 L.Ed. 2d 1249 (1967); *Standard Oil v. Moore*, 251 F. 2d 188 (9th Cir. 1957).

Turning to Hotpoint products, the application of the *Colgate* doctrine stated at the outset of this argument is inescapable. The Hotpoint Division elected, in the exercise of the independent business discretion permitted it under that rule, to sell *no retailer* in the San Francisco

area. There was no conspiratorial aspect to this decision, and appellants did not undertake to show the contrary. Nor did they show that Hotpoint ever made any exemptions to its policy of selling only to its independent distributor.

Appellants, with no foundation for a case against the Hotpoint Division, have aimed their fire against Graybar, the independent distributor. So far as Hotpoint is concerned, this fusillade is beside the mark for it is well-established in law that a distributor who buys products from a manufacturer and resells them to retailers is not the agent of the manufacturer. The independent acts of the distributor are no foundation for antitrust charges against the manufacturer. *Brosius v. Pepsi Cola Co.*, 155 F. 2d 99, 102 (3d Cir. 1946); see *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 77-81 (6th Cir. 1943).

Appellants' at best halfhearted attempts to show that the relation between Hotpoint and Graybar was anything other than manufacturer and independent distributor were put to rout by the evidence. It was repeatedly shown that Hotpoint's involvement in San Francisco marketing was limited to being supplied statistical information concerning sales in units and the identity of retail outlets, and providing monetary assistance to Graybar for the promotion of Hotpoint products, with a Hotpoint representative traveling a large circuit to lend occasional practical assistance to the promotion of the product line to retailer floor salesmen. Such contacts are without significance to the charge made by appellants and are no reasonable basis for an inference that Hotpoint and Graybar and/or other appellees agreed to exclude Manfree from the market.

Nor was Graybar shown to have conspired with anyone else against Manfree. The testimony established that the decision to cancel the Manfree franchise was made en-

tirely within Graybar. Graybar's policy of conditioning cooperative advertising monies on either no price or Graybar's suggested list price being advertised was simply an announcement in advance of the terms on which funds would be distributed, no more proof of a conspiracy than an advance announcement of terms under which one will refuse to sell; cf. *United States v. Colgate & Co.*, *supra*.

The theory of "conscious parallelism" upon which appellants seek to rely requires "some consciousness of a commitment to a common scheme". *U.S. v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963). This threefold test of consciousness, commitment and common scheme can hardly be met when the very first and most basic element is lacking. Neither the Major Appliance Division nor Hotpoint were shown to be conscious of any demands or refusals concerning Manfree by alleged co-conspirators.

Even proof of "conscious parallelism" would not support a finding of conspiracy, for it is well established that such business conduct is without significance unless it takes place under circumstances which logically suggest joint action or agreement. As the District Court stated in *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*, 177 F. Supp. 743 at 746-747:

"* * * Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. * * * The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

Appellants place great reliance on *Standard Oil Co. of California v. Moore*, 251 F. 2d 188 (9th Cir. 1957), in support of their argument that sufficient evidence of a conspiracy was presented. This decision is readily dis-

tinguishable, and requires no such conclusion. In *Moore*, the plaintiff contended that a large scale conspiracy existed (as do appellants in the case at bar) with the object of maintaining retail gasoline prices in the Seattle area. This Circuit specifically held that the evidence was insufficient to establish such a conspiracy and would support only a concerted refusal to deal. 251 F. 2d at 205. This evidence included the fact that in the past, one supplier, seeking removal of curbside price signs for gasoline products, had been able to bring about removal of similar curbside signs of retail outlets of other suppliers on short notice. *Id.* at 209. The record also showed a practice of suppliers getting "clearance" from one another before taking on a new retail account, *id.* at 210, and a threat made by one supplier that the plaintiff Moore's actions were ill considered and, if continued, could result in his inability to obtain any brand of gasoline. *Id.* at 208. Such evidence, together with additional illustrations of uniform practices of the suppliers, such as discontinuing split pump accounts in a uniform manner, *id.* at 209, sufficed to show consciousness of a commitment by the suppliers to a common scheme horizontally to refuse to deal with the plaintiff Moore's retail outlet.

Similar circumstances do not exist in this case. There was no suggestion of any clearances between distributors before franchising of retail outlets, nor any suggestion that one distributor on demand could obtain parallel conduct from another distributor. In fact, relevant communications between the distributors were nonexistent.

The decision of *Girardi v. Gates Rubber Co.*, 325 F. 2d 196 (9th Cir. 1963), is also of no avail to appellants. That case dealt with a distributor who, having knowledge of a manufacturer's resale price maintenance policy which would result in the manufacturer's termination of a distributor failing to comply with the policy, complained to

the manufacturer concerning a competing distributor, with the result that the franchise of the competing distributor was terminated.

There is nothing remotely apposite to the Girardi situation in the case at bar. General Electric (Major Appliance Division) at no time dealt with Manfree, nor did it ever inform retailers that it was being asked to, or had refused to, deal with Manfree. There was no evidence of complaint to GE concerning Manfree. The same is true of the Hotpoint Division. It never dealt with Manfree and never received complaints about Manfree. Nor is there any evidence that General Electric at any time took any punitive action against any retailer pursuant to any complaint of a competing retailer.⁹ There is, therefore, no circumstance whatever to support an inference of some unlawful conspiratorial commitment between either division of General Electric with any retailer or distributor.

II. THE TRIAL COURT COMMITTED NO PREJUDICIAL ERROR IN ITS EVIDENTIARY RULINGS

A. The Applicable Principles Supporting the Trial Court's Rulings Are Established by Decisions of This Court and Other Circuits

Appellants challenge numerous rulings by the trial court on matters of documentary or testimonial evidence. This brief deals with the Court's rulings on evidence concerning General Electric or its Hotpoint Division. The

⁹Appellants note that Lau, General Electric Sales counselor, mentioned a complaint or two made to him by retailers in the years of his work as a General Electric salesman about retail prices employed by competing retailers. The record established that Lau took no action whatever and made no reports of such complaints to GE management. Such facts do not evidence a conspiracy. *Klein v. American Luggage Works*, 323 F. 2d 787, 791 (3rd Cir. 1963).

briefs of other appellees deal with the rulings on evidence directly concerning those appellees.

The trial court's rulings were in complete harmony with the principles applied by the federal courts in cases of this type. Appellants' offers of documentary and testimonial evidence repeatedly ran afoul of the ground rules stated by this Court in *Standard Oil Co. v. Moore*, 251 F. 2d 188 (1957), *cert. denied* 356 U.S. 975 (1958) and *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (1957), *cert. denied* 355 U.S. 835 (1958).

The decisions in *Standard Oil Co. v. Moore* and *Flintkote Co. v. Lysfjord* are authority that:

(1) Out-of-court acts or declarations of a co-defendant or alleged co-conspirator are not admissible against another defendant without a *prima facie* showing of the conspiracy and that other defendant's participation therein.

(2) Documents obtained from business files are not admissible as a "business record" against *any* defendant unless the proponent shows, by way of foundation, that the document was prepared (a) in the regular course of the business; (b) in timely fashion; (c) by an authorized person.

(3) Acts or declarations of an agent or employee allegedly constituting admissions are not admissible against the principal unless the proponent shows, by way of foundation, that the agent or employee was authorized to act or speak (as the case may be) for his principal as to the transaction in question.

In *Standard Oil Co. v. Moore* the plaintiff offered a mass of documents copied from the files of the seven defendant oil companies. The trial court admitted the documents as "business records" under 28 U.S.C. § 1732. This Court reversed a jury verdict for plaintiff on the

ground that admission of these documents without a proper foundation was prejudicial error. 251 F. 2d at 212, 216-17.

The facile notion that merely finding a document in the file drawer of a defendant qualifies it for admission without any other foundation was dismissed in the *Moore* decision. 251 F. 2d 215 n. 34. The Court's statement of the true requirements for admitting documentary evidence as "business records" pointedly exposes the flaws in appellants' mode of presentation at trial:

"A memorandum or record cannot be considered as having been made in the 'regular course' of business * * * unless it was made by an authorized person, to record information known to him or supplied by another authorized person, * * * pursuant to established company procedures for the systematic or routine and timely making and preserving of company records." 251 F. 2d at 214-216.

The Court held also in *Moore* that, even with a proper foundation, evidence of extrajudicial acts or declarations by alleged co-conspirators, or their agents or employees, may not be considered against other alleged members of a conspiracy "unless there is independent evidence establishing *prima facie*, that such others were members of the conspiracy." 251 F. 2d at 210. Numerous documents offered by appellants in the present case and excluded by the trial court were barred by this rule, because they were not shown to emanate from any of the defendants against whom they were offered, or from any other person or entity with whom such defendants were shown *prima facie* to have conspired. This principle alone disposes of many of the objections now raised by appellants.

Similar principles are applied to testimonial evidence in *Flinkote Co. v. Lysfjord*, *supra*. The plaintiffs in that case were contractors who charged that Flinkote, a tile

supplier, and a number of their competitors had conspired to prevent them from obtaining acoustical tile.

This Court reversed a jury verdict for plaintiffs on the ground that the admission against Flintkote of certain testimony as to the acts or declarations of other alleged co-conspirators was prejudicial error because there was no *prima facie* showing of:

“the prior existence of the conspiracy; who were its supposed members; how they supposedly operated; what their conspiratorial purpose was; and how they brought about their alleged purposes; and Flintkote’s subsequent connection with it * * *” 246 F. 2d at 377.¹⁰

In *Flintkote* the Court further held that an alleged admission by a Flintkote employee was not admissible against Flintkote where there was no evidence that Flintkote had adopted or approved the statement, and the employee was a sales promotion man “who had no executive duties . . . but was a representative at the lower echelon.” 246 F. 2d at 383-86.

To summarize, both the *Moore* and *Flintkote* decisions of this Court held that it was prejudicial error to *admit* evidence defective in precisely the same respects as much of that offered by appellants at trial and excluded. *A fortiori* the trial court’s exclusions of such evidence cannot be the source of error or prejudice.

To these principles may be added the following which dispose of several other assignments of error by appellants:

1. The trial court has broad discretion in excluding evidence which is merely cumulative of that al-

¹⁰The Court upheld the trial court’s discretion to admit much of the evidence against Flintkote subject to later connection, but reversed for failure to strike the evidence on Flintkote’s motion at the close of trial.

ready admitted; the erroneous exclusion of such evidence does not warrant reversal. *E.g.*, *Lessig v. Tidewater Oil*, 327 F. 2d 459, 467 (9th Cir. 1964) *cert. den.* 377 U.S. 993 (1963); *Titanium Actynite Indus. v. McLennan*, 273 F. 2d 667, 673 (10th Cir. 1960).

2. The trial court does not err in excluding on one ground, evidence which is clearly inadmissible on another ground, whether or not such other ground was urged by counsel. *Los Angeles Trust Deed & Mort. Exch. v. SEC*, 285 F. 2d 162, 178 (9th Cir. 1960), *cert. denied* 366 U.S. 819 (1961).

3. Error of any kind in excluding evidence is not ground for reversal unless the appellant was substantially prejudiced by the ruling below. 28 U.S.C. § 2111; F.R.C.P. 61; *E.g.*, *U.S. v. Borden Co.*, 347 U.S. 514, 516 n. 5, 98 L. Ed. 903, 907 (1954); *Cohen v. Cole Nat'l Corp.*, 336 F. 2d 58, 60 (1st Cir. 1964).

B. The Court Correctly Excluded Certain Documentary Evidence Offered by Appellants

1. Exh. Id. 5050

Exh. Id. 5050, on which appellants rely as “demonstrating” the use of a suggested retail price by Hotpoint Division of General Electric after 1958 (Br. Appel. 28, Spec. V-C-7) was properly excluded for lack of foundation. There is no basis in or outside of the record for the assertion in appellants’ Specifications of Error that the document was “prepared by Hotpoint.” Hotpoint’s counsel made it clear at the trial that he had never seen the document before, knew nothing about its preparation, and did not know what it purported to say. The Court advised appellants’ counsel that the document could not be introduced without proper foundation and left the door open for appellants to develop a foundation. This was never done. Tr. 5453-54.

There is nothing upon the face of the exhibit to suggest that it emanated from Hotpoint. Hotpoint's independent distributor, Graybar, employed suggested list prices at all relevant times. Tr. 3093. The San Francisco district of Graybar distributed not only in Northern California, but also in the Utah and Idaho locations apparently referred to on the Exhibit. See Exhs. 31-34. Exh. Id. 5050, if it does relate to Hotpoint products, appears to be a Graybar document.

2. Exhs. Id. 5052, 4196, 4931, 4266

Appellants contend that the court's exclusion of these exhibits was error, urging their materiality to show (a) Hotpoint's knowledge of "what these retailers were doing in the retail market", and (b) sales of Hotpoint brand merchandise to other "discount stores". Br. Appel. 93, 146; Spec. V-C-2, V-I-6c.

Exh. Id. 5052 (A and B) was the Graybar notification to GE-Hotpoint in November 1963 and January 1964 that Graybar had franchised White Front Stores in Oakland, San Francisco and San Jose. It was established by other evidence and not disputed that the Statistical Department of Hotpoint was routinely notified by its independent distributors, including Graybar, when new retail outlets were franchised. (See Exh. 536 concerning Graybar's appointment of Manfree; Exh. 4188-B concerning the Sterling appointment).

The decision of Hotpoint's independent distributor Graybar to franchise a particular retailer characterized by appellants as a "discount store" was immaterial and irrelevant to the issue whether Hotpoint had conspired with others to withhold its products from appellants. The evidence was uncontradicted that the franchising of retail outlets in San Francisco was exclusively the function of Graybar, the independent distributor, and that the de-

cision to terminate Manfree's franchise was taken solely by Graybar through its District Appliance Manager Mr. Mayben and his superior, Mr. Call. See Hotpoint-Graybar distributor agreements, Exhs. 31A-34B; Mayben at Tr. 3265-72.

Furthermore, Graybar's decision to franchise a so-called "discount store" other than appellants was already shown by Exhibit 482, showing that it franchised the GEM store in 1962. The Court was therefore correct in excluding Exh. Id. 5052 (A and B) as both immaterial and cumulative of other evidence in the record.

Exh. Id. 4196, a schedule of sales of Hotpoint brand products by White Front Stores in the Los Angeles area in 1957 and 1958, and in the Oakland-San Francisco area in 1963, was likewise properly excluded as immaterial and cumulative. The sales by White Front in Los Angeles were immaterial as they in no way related to the San Francisco market.¹¹ The fact that Graybar informed Hotpoint of unit sales to individual retailers in the San Francisco area was not disputed and established elsewhere in the record. See Exh. 4268.

Exh. Id. 4391 was properly excluded as it was immaterial, cumulative and without proper foundation. It is styled a "Refrigeration Department Marketing Representative Report" and appears to be a report by Mr. Vi Owen of Hotpoint of his "dealer contacts" in San Jose, San Francisco and Sacramento, noting that Hale's in San Francisco was "going great." So far as it tended to establish knowledge by Hotpoint of the performance of the retail dealers appointed by Graybar, Exh. Id. 4391 was cumulative of other evidence. See Exh. 4268. The same is true as to visits by Hotpoint representatives to retailers franchised by Graybar, Tr. 4229-30, or knowl-

¹¹Moreover, Graybar had nothing to do with franchising retailers for Hotpoint products in Los Angeles.

edge by Hotpoint that Hale's had been franchised by Graybar. Exh. 638. The document was manifestly insufficient as it was offered without foundation in connection with the testimony of a Graybar witness (Mr. Mayben) who stated that he had never seen the document before and knew nothing about it. Tr. 3245-46.

Exh. Id. 4266, a summary of sales of Hotpoint brand products by Graybar to the GEM store in San Leandro in 1962 and 1963 was cumulative and immaterial. The Court had already admitted into evidence for what it was worth a September 5, 1962 letter by Mr. Mayben of Graybar, giving notice to Hotpoint of Mayben's decision to franchise GEM. Exh. 482.

3. Exh. Id. 548

Appellants urge error in the exclusion of Exh. Id. 548 (Br. Appel. 160; Spec. V-I-7) as evidence of refusal to deal. This October 30, 1961 demand letter to Graybar by Mr. Bernard Freeman of appellants was cumulative in that several demands by U.S.E. on Graybar and Hotpoint for products were already established. Exhs. 526, 538. The exhibit was hearsay as to Hotpoint.

4. Exhs. Id. 1184, 5090-5100

Error is asserted in the exclusion of this evidence purportedly establishing "special arrangements between appellees and the retail defendants" said to be "discriminatory" Br. Appel. 159; Spec. V-C-6.

Exh. Id. 1184 was excluded for irrelevancy and lack of foundation. Counsel for appellants admitted that the document came from the files of Hale's (Tr. 6250) but sought to introduce it against General Electric by questioning Mr. Bernard Meseth of GE as to whether it bore the signature of a Mr. Ray White, a General Electric employee. Mr. Meseth testified the signature was not Mr. White's, that he had no knowledge of the document, and that he

had never seen it before. Tr. 5332-5334. The document was clearly hearsay as to General Electric, and there was no proper foundation for its admission.

Exhs. Id. 5090-5100 were a group of General Electric advertising authorizations, some referring to "special" rates for special advertising promotions. The court correctly noted that these exhibits were merely cumulative of many others previously admitted unless appellants' counsel planned to show that the rates offered were in fact discriminatory; i.e., that they were not offered on an equal basis to all. Tr. 5360. The General Electric witness Meseth testified earlier that all General Electric advertising promotions were offered to all retailers on a proportionately equal basis. Tr. 5292-5296. On the representation of appellants' counsel that appellants would prove otherwise (Tr. 5361) the exhibits were marked for identification, but appellants' counsel never attempted thereafter to establish that any advertising program referred to in any of the exhibits under discussion had not in fact been offered by General Electric to all retail dealers on the same basis. Other exhibits in evidence (Exhs. 712, 713) showed similar "special" advertising promotions.

5. Exhs. Id. 5032, 5033, 5034, 5044, 5045, 5046 and 5047

Appellants assert at Spec. V-C-1 that the court erred in excluding these exhibits. Exhs. Id. 5032-5034 were 1963 inter-office correspondence of General Electric discussing the possible franchising of White Front Stores as a retail dealer for General Electric brand merchandise in Northern California. Exh. Id. 5044 was a 1965 document indicating that General Electric subsequently franchised White Front.

Far from evidencing any conspiracy by General Electric with other manufacturers, distributors or retailers to boycott appellants, these documents confirm that General

Electric selects its franchise dealers unilaterally in consideration of the ultimate objective of obtaining the best possible market penetration. The Court properly ruled that, absent any *prima facie* showing of a conspiracy with others, General Electric's thinking on franchising White Front Stores was its own business, and that the documents showed nothing material to an alleged conspiracy between General Electric and the other defendants in the case. Tr. 5253-5254.

Exhs. Id. 5032-5034 and 5044 were also cumulative. Meseth of General Electric testified that mass merchandising, as well as other types of retail outlets and business trends in general, were discussed within General Electric (Tr. 5262-5263), that the subject was not discussed with other manufacturers, distributors or retailers (Tr. 5264-5265), and that there is an element of risk any time an addition to dealer structure is made (*Ibid.*).

Exhs. Id. 5045-5047 are apparently breakdowns of brands of television and major household appliances carried by various retailers in the San Francisco area. They were properly excluded for lack of foundation, immateriality and lack of relevance. Tr. 5268. They were offered through Mr. Meseth, who testified that he was employed in Sacramento at the time one of the documents was dated ("8-26-63") and that he had never seen them before. Tr. 5266. The only foundation offered for the documents was counsel's statement that they were "from the files of General Electric Company". *Ibid.*

The exclusion of these exhibits in no way prejudiced appellants, for they never contended that General Electric had conspired in any way with other "mass merchandisers." Observation visits by General Electric representatives to the premises of such merchandisers, if proved, would show nothing more than GE's unilateral interest in apprising itself of market trends.

6. Exh. Id. 431

Appellants rely frequently upon Exh. Id. 431, which appears as Appendix B to their brief, in support of their contention that “joint and collaborative action among the appellee and co-conspirator manufacturers * * * [was] clearly established by substantial evidence.” The finder of fact is asked to infer that such collaboration had an unlawful purpose and in some way relates to this case. See, for example, Br. Appel. 71, 73, 165.

Exhibit 431, an unsigned, undated document attached to a letter and styled “Executive Management Responsibilities in Marketing Practices”, is a discussion of certain pricing and advertising practices and an outline for providing equal price and advertising terms to all in accordance with the Robinson-Patman Act. It certainly is not evidence of any conspiracy to boycott appellants in particular, or “discount houses”, in general.

The foundation for the document was totally insufficient. It was hearsay as to General Electric. The only information about its origin was that it came from the files of Norge Sales Corporation, a party no longer in the case. Neither (a) the author of the memorandum; (b) his employer; (c) the circumstances surrounding its preparation; nor (d) the persons who received it were ever established. Appellants’ counsel did not establish that General Electric had any knowledge whatsoever of this document.

7. Exhs. Id. 2093-2095, 2097, 3002, 3003, 3007, 3010, 3022, 3024, 3025, 3026, 3029, 3036, 3037

Most of these exhibits relate to the National Electrical Manufacturers Association (NEMA) and the American Home Laundry Manufacturers Association (AHLMA). The claims of error in their exclusion appear at Spec. V-I-11 through 15.

The above documents were all properly excluded, because they were hearsay as to General Electric, lacking in proper foundation, and devoid of any probative value in support of the alleged conspiracy to "boycott" Man-free.

8. Accountant's studies of appellants (Exhs. Id. 1491, 1492, 1500, 1560, 1561-1578, 1579-1681, 4334, 4335, 4336, 4337, 4339, 4340)

The trial court excluded numerous studies prepared by appellants' accountants. See Br. Appel. 166-168; Spec. V-I-16 through 20. *Voir dire* examination of the authenticating witness revealed that he had not done the work personally (Tr. 6306), that the exhibits were prepared from records of parties not before the court (Tr. 6311-13), that they were based on mistaken assumptions (revealed only to the extent of the witness' limited knowledge of their manner of preparation), and that they did not distinguish between San Francisco operations and out-of-city operations for retailers having branches both within and without the city. See generally Tr. 6319-6401.

Some of the documents purported to show that distributors' suggested list prices and retailers' "tag prices" were identical, but the witness confirmed that he did not know the prices at which merchandise was tagged (Tr. 6383), or sold. Tr. 6387. Other schedules attempted to establish "discriminatory" variances in General Electric's prices to retailers, yet the witness admitted that the person preparing the exhibits did not know the prices at which merchandise was actually billed by General Electric. Tr. 6388, 6395.¹³ The witness did not know that certain volume allowances referred to in the exhibits were standard allowances offered by General Electric to all retailers on volume purchases. Tr. 6392. The person

¹³The schedules apparently were prepared from retailer records not in evidence containing purchase orders, as compared to supplier invoices.

preparing the schedules could not determine whether a particular purchase order was in fact part of a larger shipment entitling the retailer to a standard volume discount on a carload shipment. Tr. 6392-93. Nor were price variations of General Electric products for different colors of merchandise taken into account, even though these variations appeared on General Electric price sheets and applied equally to all customers. Tr. 6389-91. The exhibits therefore presented a distorted, inaccurate and entirely false picture, which required their exclusion. Tr. 6401.

9. Exhs. Id. 5117 and 5118

These exhibits allegedly excluded in error (Br. Appel. 163-64; Spec. V-I-8) showed purchases of General Electric small appliances by Camrose, a separate concessionaire in the U.S.E. store. They were not designated in appellants' required pretrial lists. Furthermore, the evidence showed that General Electric brand small appliances (such as irons, toasters, etc.) were distributed on an independent basis by the General Electric Supply Company, an entirely separate division of General Electric with headquarters in San Francisco. Tr. 4187, 5291. Testimony by Messrs. Gough and Meseth established that the marketing considerations involved in the distribution of small appliances are substantially different from those in the distribution of major household appliances. Tr. 4196-98, 5292. The Court properly excluded all evidence of the Camrose purchases of small appliances on the grounds that it was irrelevant, lacking in foundation and immaterial. Tr. 6599-6601. The exclusion was in no way prejudicial.

C. The Court's Rulings in Connection with Testimonial Evidence Were Proper

1. Limitation of Mr. Vern Brown's Testimony and Exclusion of Certain Exhibits Offered Therewith

Mr. Vern A. Brown was a former Graybar Employee and a resident of the San Francisco Bay Area whose name and title (District Appliance Manager) appeared on a number of documents furnished to the appellants during pretrial discovery. Mr. Brown's deposition was not taken, he was not subpoenaed until after the beginning of the trial, and his own testimony was that appellants' counsel first contacted him ten days prior to his appearance in court. Tr. 6083. Appellants now claim that the trial court committed prejudicial error in limiting Mr. Brown's testimony. Spec. V-C-3 and 4.

Mr. Brown was not named on the list of witnesses filed by appellant on July 19, 1965 pursuant to paragraph 11 of the Court's pretrial order (R. 1472) and Local District Court Rule No. 4 (11), which requires:

"A list of all witnesses, expert or otherwise, expected to testify at the trial, except those to be used for impeachment only, classified as far as practicable, according to the issue and general subject matter of their testimony, * * *"

Mr. Brown's name did appear on a list of *documents* intended to be offered at trial which appellant filed pursuant to Local Rule No. 4 (10). See R. 1534. In designating price sheets to be offered as exhibits by appellants that list states:

Witnesses expected to testify are:

Graybar & Hotpoint Price Sheets—

Mr. W. Mayben, Jr., Vern Brown, W. Wichman

On November 4, 1965, appellants' counsel produced Mr. Brown and announced that he would testify, not as

an identifying witness for the Graybar and Hotpoint Price sheets, but to Graybar's merchandising policies at various times, to asserted changes in such policies, and the reasons therefor. At no time did counsel vouchsafe any excuse for not giving the required notice that Brown would testify on matters of substance, electing instead to rely on the specious proposition that naming Brown as an identifying witness on appellants' pretrial list of documentary exhibits afforded defendants and the court sufficient notice of the nature and importance of his testimony. Tr. 6065-6070.

The trial court's ruling was a proper exercise of discretion. The salutary purposes of pretrial discovery and the careful charting of the trial by pretrial order in complex, protracted litigation such as this case would be thwarted if the requirements for advance listing of witnesses and notice of their testimony could be so lightly disregarded or artfully evaded.

The decisions of other federal courts fully support the ruling below. *E.g.*, *Heilig v. Studebaker Corp.*, 347 F. 2d 686, 690 (10th Cir. 1965); *Payne v. S. S. Nabob*, 302 F. 2d 803 (3rd Cir. 1962). A case strikingly similar to this one is *Thompson v. Calmar S. S. Corp.*, 216 F. Supp. 234, 240 (E.D. Pa. 1963) *aff'd* 331 F. 2d 657 (3rd Cir. 1964). In that action by an injured stevedore against a steamship company the trial court gave the defendant leave to amend its pretrial list of witnesses by adding the names of its experts. Defendant then added the name of a certain witness, which "clearly implied that he was to be an expert witness." 331 F. 2d at 662. At the trial defendant sought to have the witness testify on certain factual matters and to the claimed *res gestae* utterance of another longshoreman. The trial court held (in language adopted by the Third Circuit) that it would be "wholly contrary to the spirit of our Rules and destructive of

orderly procedure . . .” to permit the testimony. 216 F. Supp. at 240; 331 F. 2d at 662.

Here, as in the *Thompson* case, the offering party knew of the witness long before trial and the adversary was completely surprised by an offer of testimony radically different from that for which the witness had been designated—if, indeed, he can be said in this case to have been designated at all.

The exhibits offered in connection with the Brown testimony (Exhs. Id. 5112 and 5113) were clearly hearsay as to Hotpoint and were not identified *on any of appellants’ pretrial lists*, a circumstance which clearly called for their exclusion. *Globe Cereal Mills v. Scrivener*, 240 F. 2d 330, 335 (10th Cir. 1956); *Hoepfner Constr. Co. v. U. S.*, 287 F. 2d 108, 112 (8th Cir. 1961).

The court properly ruled that Brown’s testimony concerning a meeting attended by Mayben of Graybar was obvious hearsay as to Hotpoint-General Electric, where Brown could not recall whether a Hotpoint representative was present. Tr. 6122-23.

2. The Ruling that Mr. William Lau Was Not an Adverse Witness

The trial court correctly held that Mr. William Lau, a sales counselor for General Electric from 1955 to 1963, was not an adverse witness at the time of the trial under Federal Rule of Civil Procedure 43 (b). Tr. 4326-29. At that time the witness was employed by Magnavox Corporation, a competitor of General Electric, which was not named as a defendant or co-conspirator or in any way involved in any of the events in suit. Lau, a salesman who had no executive or supervisory duties when he was with GE, had neither the requisite degree of authority and discretion in dealing with General Electric’s interests, nor any personal alignment with those interests.

Therefore he was not a "managing agent" of GE. See *Brandon v. Art Centre Hospital*, 366 F. 2d 369, 372 (6th Cir. 1966); *Skogen v. Dow Chem. Corp.*, 375 F. 2d 692, 701 (8th Cir. 1967); Cf. *Flintkote Co. v. Lysfjord*, *supra*, 246 F. 2d at 384-85. Moreover, the ruling was not prejudicial, for appellants were given ample latitude for attempted impeachment of Mr. Lau. See Tr. 4333-42.

3. Exclusion of Bernard Freeman's Testimony As to Statements by Ray White of General Electric

The claim is made that the testimony of Mr. Bernard Freeman of appellants to a conversation with a General Electric salesman, Mr. Ray White, was improperly excluded. Spec. V-C-5. The record establishes that at the time of the alleged conversation, Mr. White was a General Electric salesman whose sales jurisdiction did not include appellants' store and who had no authority to deal with plaintiff in any way, let alone to speak for General Electric as to whether U.S.E. would get a franchise. Tr. 4393, 5832-35, 5867-68. The foundation for the alleged statements by White was therefore insufficient, and the court's ruling was correct. See discussion of *Flintkote Co. v. Lysfjord*, *supra*, at pp. 35-36.

4. Exclusion of Evidence Concerning the Prior Action by Klor's, Inc. Against General Electric and Others

Appellants assert error in the exclusion of evidence pertaining to a prior lawsuit conducted by appellants' counsel against General Electric and others on behalf of Klor's, Inc., a former San Francisco retailer. Br. Appel. 168-69; Spec. V-I-21 and 22. That action (Civ. No. 35,274) went to trial against General Electric alone in the United States District Court in San Francisco before the late Judge Louis Goodman and resulted in a judgment for General Electric upon a directed verdict granted by Judge

Goodman on January 24, 1961, for insufficiency of the evidence to establish participation by General Electric in any agreement or conspiracy to boycott Klor's.

Appellants' counsel made an offer of proof concerning the Klor's lawsuit in conjunction with the testimony by Mr. Meseth of General Electric. Tr. 5313-19. The sum and substance of the offer was that between 1953 and 1956 Meseth was then a General Electric salesman, that Hale's outlet on Mission Street in the vicinity of Klor's was franchised for General Electric major appliances, and that Meseth had a conversation with Mr. Klor sometime before 1956, wherein Mr. Klor requested major appliances, and was advised by Meseth that General Electric would not franchise Klor's for appliances because of information that Klor's was in serious financial difficulties. Klor advised Meseth that he was attempting to get new capital.

Appellants later sought to call as a witness Mr. Samuel Frachtenberg, a former shareholder in Klor's not listed as a witness. The trial court's refusal to admit the Frachtenberg testimony was a sound exercise of discretion. The court correctly noted that the proposed testimony of Frachtenberg was "not impeachment testimony in any form or character." Tr. 5683. The failure to list Frachtenberg as a witness before trial fully justified the rejection of his testimony (see cases cited in the discussion *supra* at pp. 47-48 of the Brown testimony), particularly as appellants' counsel already had been given much latitude in seeking to retry issues which had been finally adjudicated in the prior action by Klor's.

In any event, the proffered testimony concerning Klor's was properly rejected for immateriality. The refusal of a General Electric appliance franchise to Klor between 1953 and 1956 because of Klor's financial difficulties was utterly without relevance to the instant action.

5. Exclusion of Portions of Mr. Arthur Alpine's Deposition

Mr. Alpine's statements at his deposition giving his version of conversations with Mr. Meseth of General Electric and with an unidentified Graybar representative at about the time Graybar cancelled Manfree's Hotpoint franchise were plainly inadmissible, appellants' claim of error (Br. Appel. 155-56; Spec. V-H-a, f) notwithstanding. Mr. Alpine testified unequivocally that he prepared memoranda of each of these conversations and transmitted them to U.S.E.'s counsel. Dep. Tr. 177, 250. Yet he repeatedly refused, upon the advice of counsel, either to produce the memoranda for inspection by appellees' counsel or to answer questions concerning them. Dep. Tr. 250-52. The trial court's decision to exclude those portions of the deposition as to which appellees were denied the right to cross-examine Mr. Alpine effectively by the withholding of the memoranda until after his death was required in the interests of justice and is fully justified by authority. See F.R.C.P. 26 (c); *DuBeau v. Smither & Mayton, Inc.*, 203 F. 2d 395, 396-97 (D.C. Cir. 1953); *Continental Can Co. v. Crown Cork & Seal, Inc.*, 39 F.R.D. 354, 356 (E.D. Pa. 1965); cf. *Lipscomb v. Groves*, 187 F. 2d 40, 44 (3d Cir. 1951). Any other result would have rewarded the withholding of the memoranda (which the trial court later ordered produced on motion) and penalized appellees for a delay of which they were in no way the cause.

III. THE TRIAL COURT'S RULINGS ON DISCOVERY WERE PROPER AND NO PREJUDICE CAN BE SHOWN FROM SUCH RULINGS

A. Item 15 of June 2, 1964 Motion and Item 20 of November 1964 Motion under F.R.C.P. 34.

Appellants claim prejudice because "definitive orders were not granted allowing the production of all intra-

office correspondence regarding [appellants'] requests for product." Br. Appel. 173.

Nothing of the sort occurred. In their June 1964 motion directed to factory defendants appellants sought production in item 15 of:

"all intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above named or the retail defendants above named during the above period of time".

This call for production was denied for the obvious reason (among others) that the description was wholly lacking in the requisite definition or particularity of subject matter. The court did require production under the June 1964 motion of any correspondence or memorandum exchanged by General Electric with any remaining defendant pertaining either to appellants or to any so-called discount store or business operated in a manner similar to plaintiffs (Item 12, R. 673).

In November 1964 the court required production under Item 20 of all letters from appellants received by General Electric on which there were contained any notes, memoranda or inter-office communication relating to such requests, and such were produced. The letters of appellants which were not marked with General Electric notes were not required to be produced, for the obvious reason of lack of good cause. The implication in appellants' brief (p. 175) that Item 20 of the November 1964 motion directed to the factory defendants was not allowed is incorrect. See R. 1057, 1063.

B. The court's rulings concerning Items 22c, d, e and Item 27f, of the November 1964 motion were correct; so far as relevant the documents had already been produced or else did not exist.

Item 22c sought letters exchanged between factory and local distribution relating to preventing the plaintiff from

acquiring product from other sources or distributors. This type of material had already been requested from General Electric as a factory defendant and allowed by the court in the June motion, pursuant to items 12, 18 and 23 thereof. R. 673, 680-681.

Item 22d of the November motion called for letters exchanged between factory and local distribution concerning conversations or statements made by any representative of retail dealers on pricing, advertising and similar matters. These items are substantially those required and allowed by the court under items 11, 18 and 19 of the June motion. R. 673, 680-681. It was established by both General Electric responses to interrogatories (namely the responses to appellants' last set of interrogatories numbers 4 and 5, R. 1238) as well as the supporting affidavits filed in connection with hearings concerning the motions to produce, that no such materials existed other than those produced. See affidavits of Segerson, R. 520-521; McAlpin, R. 514-16. No prejudice can be shown from the court's ruling on item 22d, in view of the repetitive nature of the demand and the failure of appellants to establish that any such documents existed other than those already produced.

Item 22e requested production of correspondence concerning the sale or possibility of sale to certain retail outlets of the so called "mass merchandiser" variety. Item 12 of the June motion allowed by the court had required production of all correspondence or memoranda kept by General Electric referring to any so called discount house or business operated in a manner substantially similar thereto. R. 673, 680.

Item 27f sought to require factory defendants to produce letters or notes of minutes found in the company files of representatives who "attended associations", pertaining to NEMA, EIA, GAMA and AHLMA, and

discount department stores or mass merchandising stores. Under item 23 of the June motion General Electric had been required to produce all "notes" or "memoranda" pertaining to sales to discount or mass merchandisers. It had also been required to produce under item 12 thereof any correspondence kept by it concerning discount stores or businesses similarly operated. R. 673, 680. Appellants had access to the minutes of said organizations through depositions of their custodians of records. As established by the affidavits of Segerson and McAlpin (R. 514, 520), General Electric had no notes, reports or minutes relating to any meetings with any other factory defendants concerning mass merchandising or discount stores. No prejudice can be shown to appellants from the court's ruling in regard to item 27f.

C. Rulings on Interrogatories

Appellants claim error in the court's ruling in regard to their interrogatory No. 2 filed September 29, 1964 (Br. Appel. 174) inquiring as to the existence of any report reflecting a conversation between General Electric and any person having to do with the buying, selling or advertising of products either by appellants or by any retail defendant.

The court properly sustained objection to this ill defined request. Appellants had covered substantially the same ground in their various motions to produce. See Items 11, 12, 18, 19 and 23 of their June 1964 motion for production addressed to factory defendants, R. 424-25, and the order of the court granting these requests. R. 673. The subject was also treated in depositions of General Electric witnesses. E.g., Wichman at Dep. Tr. 38, 148, 157; Lau at Dep. Tr. 29; Meseth at Dep. Tr. 103. Subsequently appellants served their second set of interroga-

tories, to which General Electric filed its responses of May 28, 1965 which established that no statement, memorandum or report existed which reflected any conversation between any representative of General Electric with another representative, or between General Electric and another defendant, in which appellants were in any way mentioned, and that there were no writings reflecting a conversation between General Electric representatives, or between a General Electric representative and a representative of another defendant with respect to any agreement, understanding or policy, stated or suggested, concerning retail pricing, terms and conditions, at which products were sold, shown for sale, or advertised by retail defendants, which had not been produced theretofore in the action. R. 1238.

Appellants also challenge the court's ruling sustaining objection to their interrogatory seeking information as to conversations between General Electric attorneys and representatives of other defendants in which the plaintiffs were mentioned, expressly or by implication. (R. 792-93, No. 3 of plaintiffs' second interrogatories). This interrogatory plainly attempted to delve into the work product of General Electric's attorneys, an excursion for which no showing of cause was offered. The interrogatory was wholly improper, seeking without justification "to pry into and discover the results of conferences and communications between counsel for and agents of a party, or parties similarly situated, after the institution of suit and in preparation for trial."

Byers Theaters v. Murphy, 1 F.R.D. 286, 289 (W.D.Va. 1940).

See also

Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D. New York 1960).

CONCLUSION

Upon the basis of the foregoing authorities appellee General Electric Company respectfully submits that the judgment of the District Court directing a verdict in favor of said appellee and dismissing the complaint against it should in all respects be affirmed.

San Francisco, California,
April 24, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 20770.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED SHOPPERS EXCLUSIVE, a California corporation,
and MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York Corpora-
tion, *et al.*,

Appellees.

**BRIEF OF APPELLEES THE MAYTAG COM-
PANY AND MAYTAG WEST COAST COM-
PANY.**

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No. 20770.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED SHOPPERS EXCLUSIVE, a California corporation,
and MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, *et al.*,

Appellees.

**BRIEF OF APPELLEES THE MAYTAG COM-
PANY AND MAYTAG WEST COAST COM-
PANY.**

Statement of Jurisdiction.

The District Court had jurisdiction of the actions brought by plaintiffs against defendants under 15 U.S.C. 15, 26 [R.¹ 1-14, 15-27].

Jurisdiction was vested in the District Court pursuant to Rules 50(a) and 41(b) of the Federal Rules of Civil Procedure to order a directed verdict and dismissal

¹The Clerk's Transcript of Record will be referred to herein as "R". The Reporter's Transcript of the oral proceedings during the trial will be cited as "Tr." Plaintiff's Exhibits which were admitted will be referred to as "Pl.Ex." The Exhibits marked for Identification only will be referred to as "Pl.Ex. for Id." The Exhibits of these Appellees will be cited as "DMT Ex." References to depositions will be cited as "Dep." The Opening Brief of Appellants will be designated as "Op. Br."

of the action at the close of the evidence offered by plaintiffs.

This Court has jurisdiction pursuant to 28 U.S.C. 1291.

Statement of the Case.

The actions filed in the District Court were for treble damages and injunctive relief under the antitrust laws. The District Court ordered that the issue of liability be tried first [R. 1608-1609]. At the conclusion of the plaintiffs' case, the Court granted the defendants' Motions for a directed verdict and for dismissal [Tr. 6916]. A Judgment on the directed verdict and Order dismissing complaints was entered [R. 1977-1978]. The Court prepared and filed its Memorandum Opinion and Order granting Motions for directed verdict [R. 1912, 1976].

Appellants' principal claim, that of a conspiracy to boycott Appellant Manfree, and their assertion that its purpose was to maintain a list price structure below which major household appliances and televisions sets could not be sold at retail has no basis in fact, or on any inference that could be justifiably drawn from the facts adduced.

The assertion that Maytag became a member of a conspiracy to boycott plaintiffs for the purpose of maintaining suggested retail sales prices is completely without merit. Admittedly Maytag furnished suggested retail prices to dealers. Almost always retailers handling Maytag items sold below suggested retail prices [Tr. 3383]. Of extreme importance is the undisputed proof that Maytag furnished advertising funds to dealers who advertised Maytag units at prices below suggested retail prices. Advertising at below suggested retail prices for

which there was reimbursement by Maytag West Coast, was placed by both asserted conspirators and non-conspirators. In the first group there were defendants Hale and Sterling. In the second group there were Young Bros., Cherin's, Butler Brothers and West Coast Washing Machine Co. (also known as Mac's Appliance Company). The record references relating to this evidence are set forth at page 13 *infra*.

Appellee, The Maytag Company, during the period covered by the complaints was a manufacturer of washing machines and dryers (Op. Br. 8).

Appellee, Maytag West Coast Company, was the wholly owned subsidiary of The Maytag Company and distributed Maytag products in portions of the west including the San Francisco area. The Maytag Company and Maytag West Coast Company have been considered as one unit or entity by Appellants, and collectively they will be sometimes herein referred to as Maytag.²

John P. Mitchel³ arrived in the San Francisco area in January of 1959 [Tr. 3310] and assumed the post of salesman-regional manager for Maytag West Coast in the San Francisco area and adjacent locations [Tr. 3306-3307].

Mr. Mitchel's predecessor was Mr. Fenn Wilson [Tr. 3311]. Mr. Mitchel surveyed the San Francisco area

²In the deposition of Claire G. Ely, which plaintiffs designated as part of the record [R. 2063, 2070, 2082], Mr. Keith, plaintiffs' counsel, in referring to The Maytag Company and Maytag West Coast Company, made the following statement:

"MR. KEITH: It's my position that the two companies are indistinguishable." ELY Dep. p. 91].

³John P. Mitchel is not to be confused with John L. Mitchell of W. J. Lancaster Co., one of the original defendants [Tr. 3404].

with a view to improving the position of the Maytag line in the market [Tr. 1112]. Maytag's penetration of the market had been unsatisfactory [Tr. 3320, 1112]. In the early part of 1959 Mr. Mitchel became acquainted with the Maytag dealers in San Francisco County including Manfree [Tr. 3311].

Manfree had a franchise with the Maytag West Coast which was to expire by its terms on March 31, 1959 [Tr. 3375, DMT Ex. 13143].

The Maytag line being more expensive than that of its competitors required retail outlets in which the salesmen employed by retailers would be willing to be educated in the superiority of Maytag products so that they could effectively promote the sale of them [Tr. 3376-3377, 3424].

The following three business reasons were given by Mr. Mitchel for not renewing the Manfree franchise:

1. On calling upon Manfree in the early part of 1959 Mr. Mitchel found the principal salesman in the appliance department, Mr. Arnold Neermann, unwilling to be educated as to Maytag products [Tr. 3376-3377, 3422, 3425, 3427].

2. Mr. Neermann, according to Mr. Mitchel, smelled like a distillery [Tr. 3376-3377, 3425].

3. Mr. Mitchel also was of the opinion that a closed-front membership operation was not a desirable outlet for the Maytag line, in that Maytag was advertised nationally, and the advertisements did not carry the information that to see a Maytag it was necessary to belong to a group or a membership type of store, and a closed front membership operation restricted the potential traffic [Tr. 3379, 3428].

Two or three weeks prior to the expiration date of the Maytag West Coast-Manfree franchise, Mr. Mitchel advised a representative of Manfree that the franchise would not be renewed [Tr. 3382].

The record does not show that Mr. Mitchel or any representative of Maytag knew what product lines, other than Maytag, were or were not available to Manfree. The testimony on this subject is found at [Tr. 3357].

There is no evidence in the record that any retailer defendant conditioned its purchases from Maytag on the promise of Maytag not to deal with Manfree. The evidence establishes the contrary [Tr. 3324-3325].

Appellants' assertions at page 79 and elsewhere in their Brief that at the time that Maytag and certain other lines were cancelled, Manfree's officers were told by vendor representatives that the reasons for such cancellations were either pressure from Hale or other large San Francisco retailers not to sell Manfree, or threats that if they sold to Manfree, they could not sell to such competing retailers, is completely without foundation. The evidence as to Maytag proves the contrary. Plaintiffs' Exhibit 641 shows that defendants Hale, Lachman Bros., Redlick and Sterling all purchased from Maytag during at least a part of the time Maytag was selling Manfree, which was from January 1958 until March of 1959 [Pl. Ex. 1523].

Appellants take the position that there was parallel conduct on the part of the defendant suppliers of household appliances and television sets. Such was not the case. Some suppliers sold to Manfree, others did not. Those that did sell did so for non-identical periods [Pl. Ex. 1523].

For example, defendant Lancaster stopped selling to Manfree in November of 1957, and Maytag did not commence selling to Manfree until January of 1958 [Pl. Ex. 1523].

As mentioned above, the Maytag West Coast franchise with Manfree expired by its terms on March 31, 1959 and Maytag did not thereafter sell Manfree. It is noteworthy that defendant Macy's bought no units from Maytag in 1960 [Pl. Ex. 641], and that defendant Redlick purchased nothing from Maytag in the years 1960, 1961 and 1962 [Pl. Ex. 641].

Also of significance is the fact that at the same time the Manfree franchise was not renewed, twenty to thirty other dealer franchises were likewise not renewed. These dealers included defendants Lachman Bros. and Sterling Furniture [Tr. 3332-3333, 3430].

It is important to point out that plaintiffs in answer to interrogatories propounded by Maytag stated under oath that the conspiracy of which Maytag became a member on April 30, 1959, was commenced prior to that time, and is known to plaintiffs to have existed in May, 1957 (Appellants' Specification of Errors, page xxxi). The significance of plaintiffs' answer to these interrogatories will be discussed at pages 38-44, 49-51 herein.

Apart from the refusal to deal after March or April of 1959, Appellants seize upon isolated and meaningless acts of Maytag to establish its participation in the asserted conspiracy, to wit, the purchase by Hale in February of 1959 of \$10,848.00 of Maytag merchandise for use at seven Hale stores [Tr. 3382; Pl. Exs. 639 and 640], and the furnishing by Maytag West Coast to Hale in February of 1959 of a \$3,000.00 advertising allowance.

There is no evidence in the record that Maytag had any connection whatsoever with Appellants asserted inability to advertise in certain newspapers.

Furthermore, Maytag was not a member of NEMA [Tr. 3494], nor EIA (Op. Br. 74), nor did it participate in its activities, nor did Maytag participate in Better Business Bureau activities or Northern California Electrical Bureau functions (Op. Br. 108).

Admittedly The Maytag Company was a member of AHLMA, and representatives of The Maytag Company attended AHLMA meetings.

Other evidence will be alluded to in the argument which follows:

Questions Involved.

Appellants have advanced a number of points and contentions. The questions which pertain specifically to the Maytag Appellees are the following:⁴

⁴Other points raised by Appellants are met in Appellees', General Motors-Frigidaire Brief, to which reference is made, under the headings pertaining to the following subjects:

Discovery—I;

The correctness of the Pretrial Order under August 17, 1965 [R. 1608-1609]—II;

The correctness of the August 13, 1965 Pretrial Order separating the issues of liability and damages—III;

Advertising in San Francisco newspapers—IV-A6;

The exclusion of portions of the Alpine deposition—V-A(3);

The exclusion of certain documents relating to Trade Associations—V-A(4);

Studies prepared by Appellants—V-A(5);

Evidence *re* the Better Business Bureau—V-B(1);

Evidence as to the San Francisco Call-Bulletin—V-B(2);

Evidence as to the *Klors* lawsuit—V-B(3), (Maytag was not involved in the *Klors* case Op. Br. 168);

Miscellaneous evidence points—V-B(4);

The taxation of costs was proper—VI.

(This footnote is continued on the next page)

1. Did Appellants, in accordance with the governing rules, make out a case of participation by Maytag in a conspiracy to boycott Manfree?
2. Did the trial court err in its rulings on evidence?
3. What probative value to Appellants were acts antedating April 30, 1959, the date plaintiffs claimed Maytag joined the asserted conspiracy?
4. Did the Court err in its discovery rulings?

Summary of Argument.

Maytag's argument in summary is:

1. There is no evidence which would support an inference of Maytag's participation in any alleged conspiracy. Maytag's acts were the product of legitimate business aims.
2. The court's evidence rulings pertaining to Maytag were not error.
3. Evidence relied upon by Appellants antedating April 30, 1959 can not be relied upon to establish injury to plaintiffs or as acts in furtherance of an asserted conspiracy, which Maytag, according to plaintiffs' claim, did not join until April 30, 1959.
4. There was no error as to Maytag with respect to the Court's discovery rulings.

Reference is also made to the treatment of the exclusion of certain documents relating to trade associations in Brief of Appellees Borg-Warner and Norg Sales under headings IV-B(2), (3) and (4), and to the exclusion of portions of the Alpine deposition in Brief of Appellee California Electric, pages 26-31.

ARGUMENT.

I.

THERE WAS NO EVIDENCE OF MAYTAG'S PARTICIPATION IN THE ASSERTED CONSPIRACY AMONG APPELLEES IN VIOLATION OF SECTIONS 1 AND 2 OF THE SHERMAN ACT, NOR WAS THERE ANY EVIDENCE WHICH WOULD SUPPORT ANY FAIR OR REASONABLE INFERENCE OF SUCH PARTICIPATION.

The Appellants' constant reiteration that there was a conspiracy to boycott Manfree for the purpose of maintaining list prices is completely without foundation. As will be shown at page 13, *infra*, Maytag not only knew that defendants Hale and Sterling and other retailers were offering, by newspaper advertisements, Maytag appliances at prices below list, but additionally, Maytag furnished cooperative advertising for such advertisements.

Maytag's decision not to renew the Manfree franchise was for legitimate business reasons discussed, *infra*, pages 16-20.

There is no evidence in the record to show that the Maytag West Coast decision not to renew the Manfree franchise was determined by anyone other than Maytag West Coast personnel [Tr. 3404-3405].

Appellants conceded that there was no direct evidence of conspiracy among Appellees [R. 1439].

Cases such as *Standard Oil Co. of California v. Moore*, 251 F. 2d 188 (9th Cir. 1957); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klors*

v. Broadway-Hale Stores, 359 U.S. 207 (1959), and *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F. 2d 196 (9th Cir. 1963), relied upon by Appellants, are not apposite.

In the *Moore* case there was evidence of communications and contacts among competitors of a nature not present in the case at bench, p. 209. Likewise, in the *General Motors* case, there was proof of agreements among the defendants not to permit certain outlets access to automobiles, pp. 143-144. In *Klors*, which was decided on a motion for summary judgment, the Supreme Court's decision rested on the question of injury to the public. The complaint in *Klors* alleged a combination, p. 213, no like evidence exists here. In *Girardi* at least one of the dealers, a Mr. Oranges, complained to Gates of Girardi's price cutting, p. 202. No such evidence is present here.

Appellants contend that a conspiracy can be inferred from the established facts as to Appellees' conduct.

This case must be governed by well known rules. Appellants may rely only upon reasonable inferences from proven facts and not upon speculation, surmise or conjecture. There was no parallel conduct; however, proof of conscious parallel conduct, assuming, *arguendo*, it exists here, does not establish the fact of conspiratorial agreement.

A. Plaintiffs Did Not Adduce Evidence in Proof of the Asserted Conspiracy to Boycott Plaintiffs for the Purpose of Maintaining List Prices, and the Evidence Affirmatively Refutes the Existence of Such Claimed Conspiracy.

The central theme of Appellants' argument is that there was a conspiracy to boycott Manfree for the purpose of insuring the maintenance of a list price structure below which major household appliances and television sets could not be sold.⁵ The claim of Appellants is that Manfree sold and proposed to sell below suggested retail prices and, for this reason, was conspiratorially denied access to the products of the supplier defendants.⁶ Despite the many assertions in and references throughout Appellants' Brief to the claimed conspiracy to boycott for the purpose of maintaining the defendant suppliers' suggested retail prices in the advertising and sale of the affected brands, Appellants not only failed to introduce evidence to support the existence of a conspiracy but also did not introduce evidence that any uniform pricing program existed.

The only evidence of *specific* prices at which any product lines here involved were *actually* advertised and offered for sale was adduced through the testimony of Mr. John Mitchel. This evidence which will be discussed

⁵The furnishing of retail price lists does not create a permissible inference of conspiracy even if dealers sell at the suggested prices.

Klein v. American Luggage Works, Inc., 323 F. 2d 787-791 (3rd Cir. 1963).

⁶Representatives of Manfree testified that the following retailers, all of whom were Maytag dealers [Pl. Ex. 641], sold at discount prices and below suggested retail prices: Lambert Home Furnishings, House of Karlson, Cherin, Young Bros., Balboa Furniture, Brown Furniture, Dulfers [Tr. 5648-5649; 6005-6006].

infra, affirmatively shows that during 1959, the year in which Maytag is claimed to have joined the asserted conspiracy, defendants Hale and Sterling and four other San Francisco retailers who were not claimed to be conspirators, consistently and extensively advertised Maytag products at retail prices substantially different from and lower than Maytag suggested list prices and were reimbursed for that advertising by Maytag under its cooperative advertising program.

Apart from the Mitchel evidence, there is nothing in the record as to specific prices quoted in dollars and cents at which San Francisco area retailers advertised and sold relevant brands.⁷ Thus, Appellants, have failed to show any particular instance of a sale by a defendant retailer at list price.

As to the general policy of the defendant retailers and without reference to specific prices, the record is uncontravened that as a matter of practice defendant retailers sold at below suggested retail prices [Tr. 901; 1183; 1453; 2352-2353; 3289; 3333; 4085-4086; 5029; 5646; 5648-5649].

Likewise, the testimony is uncontradicted without reference to specific amounts that advertising by the defendant retailers was frequently below list prices [Tr. 209; 430; 729-730; 1321; 1431-1433; 1450; 1515-1516; 2352-2353; 5646].

⁷There is a notable example of Hale's not following Maytag's suggested retail prices in a Maytag price list taken from Hale's files [Pl. Ex. 4346-B]. Figures written in the hand of Mr. Sanford of Hale on said exhibit show the difference between Maytag's suggested retail prices and Hale's retail prices. The suggested retail price is given first, followed by the Hale retail price:

\$389.95-\$359.95; \$229.95-\$219.95; [Tr. 719-722].

\$269.95-\$239.95; \$289.95-\$259.95;

That the conspiracy claimed by appellants to boycott Manfree for the purpose of maintaining list prices is nothing more than a myth is precisely documented and demonstrated by retailers' advertisements in San Francisco newspapers in 1959, showing Maytag items offered for sale at below list prices. These advertisements were run by defendants Hale and Sterling and by non-conspirators Butler Brothers, Cherin's, Mac's Appliance Company (sometimes known as West Coast Washing Machine Company), and Young Brothers. The following exhibits are the advertisements referred to [DMT Ex: 1034-1038 Butler Brothers; 1039-1041 Cherin's; 13043-13047, 13049-13054A; 13059A-13060 Hale; 13069-13070 Sterling; 13074-13077 Mac's Appliance Company-West Coast Washing Machine Company; 13090-13097 Young Brothers]. The testimony of Mr. Mitchel, the Maytag West Coast Regional Manager in the San Francisco area, identifying the Maytag models displayed in the advertisements and his verification of the fact that the advertising was below list prices, is found in the record at Tr. 3383-3404.

Of extreme significance is the documentary evidence in the form of Credit Memos showing that as to each of the advertisement exhibits offering Maytag products at less than list prices, cooperative advertising funds were furnished the dealer by Maytag [DMT Ex: 13098-13100 Butler Brothers; 13101-13104 Cherin's; 13105-13112, 13114 Hale; 13120-13121 Sterling; 13124-13127 Mac's Appliance Company-West Coast Washing Machine Company; 13133, 13135, 13136, 13138-13140 Young Brothers.] Mr. Mitchel's testimony as to supplying advertising funds to Maytag dealers who advertised Maytag appliances at below list prices is at Tr. 3383-3404.

That Maytag would, if it were insistent upon maintaining a program of having its line sold at list prices, supply advertising funds to those who sold below such prices, goes beyond credibility.

Appellants would attach some significance to the following language in the Maytag cooperative advertising contract:

“4. Distributor will not pay for classified advertising, advertising containing unauthorized price reductions, advertising that is misleading or false in any way, . . .”

Mr. Mitchel's uncontradicted testimony is that this provision of the cooperative advertising contract was never enforced with anybody [Tr. 3339]. There is no testimony, except as to one unique instance, that there was any discussion between any retailer and Maytag as to price advertising or the form the advertisement was to take. There is no contradiction of Mr. Mitchel's testimony that with respect to advertising of the Maytag line, the extent of his participation was authorizing dollars for that purpose and supplying retailers with mats and product information for their ads. His testimony in this regard is, “But beyond that I had no control over them” [Tr. 3342]. The single exception we have mentioned was in connection with a Maytag cooperative advertising contract with Hale concerning the advertising of a combination washer-dryer [Pl. Ex. 337]. Mr. Thomas, the Hale representative, and Mr. Mitchel were each of the view that because this appliance was extremely expensive, price advertising would not be feasible from a marketing standpoint. Plaintiffs' Exhibit 337, by the very language written therein, supports the fact that Maytag did not demand adherence

to list prices. The language referred to is "Advertisements *not* to show list price or *cut-price*, but will show only X number of dollars per week." (Emphasis added as to "cut price").

As to the Credit Memos which were received as exhibits and referred to above or with respect to any other advertising allowances granted by Maytag, there is not a shred of evidence that Maytag limited the allowance of advertising funds to those situations in which list prices would be followed.

The *sine qua non* of an actionable conspiracy to boycott, having as its objective the adherence to a list price structure, is a showing that there was in fact price maintenance. There is nothing in the evidence to show that there was any attempt to require such adherence to list price advertising or selling of the Maytag line.

Stripped of the fanciful creation of the asserted conspiratorial boycott for the purpose of maintaining list prices, the refusal of Maytag to deal with Manfree adds up to exactly nothing, except an unilateral decision not to renew the Manfree franchise based upon valid business reasons, which are clearly understandable, which will be discussed under heading B, *infra*.

B. The Non-Renewal of the Manfree Franchise Was Motivated by Legitimate Business Aims.

As related above (p. 3, *supra*). Mr. Mitchel came to the San Francisco area as a salesman for Maytag West Coast Company in January of 1959 [Tr. 3310], and became acquainted with Maytag dealers [Tr. 3311]. Mr. Mitchel's desire was to improve the Maytag penetration of the market [Tr. 1112] which had been disappointing [Tr. 3320]. Maytag's line, being more ex-

pensive than those of its competitors, could not compete on the basis of price [Tr. 3377-3378]. Consequently, it was necessary to enlist the help of salesmen engaged by retail dealers who were willing to be educated as to the superior quality of Maytag [Tr. 3376-3377]. These salesmen, in turn, would then be able to convince potential customers interested in the Maytag line of its superiority. Mr. Neermann, the principal Manfree salesman, was unwilling to be so educated [Tr. 3376-3377, 3422, 3425, 3427].⁸

Additionally, in Mr. Mitchel's words, Mr. Neermann smelled like a distillery [Tr. 3376-3377, 3425], which condition was evident on the three to four occasions on which Mr. Mitchel visited Mr. Neermann [Tr. 3377].⁹

Corroboration of Mr. Neermann's drinking habits was furnished by Mr. Marvin Boyd, the Manager of Manfree [Tr. 5534]. Mr. Boyd testified as follows [Tr. 5655-5656]:

"By Mr. Johnston:

Q. Mr. Boyd, were you acquainted with Mr. Arnold Neermann? A. Yes, I was.

Q. He was a salesman for Manfree, was he not? A. Yes, he was.

Q. Did you ever receive any complaints from your customers about his drinking?

Mr. Keith: Your Honor, we would urge that this is irrelevant, immaterial.

⁸The manager of Manfree, Mr. Boyd, testified that there was no training program for sales personnel of Manfree with respect to the sale of household appliances or television sets [Tr. 5639-5640].

⁹Appellants' assertion that Mr. Mitchel did not mention Mr. Neermann's drinking habits in his deposition (Op. Br. 122), is one example of many misstatements of the record occurring in Appellants' Opening Brief. Mr. Mitchel testified in his deposition that Mr. Neermann smelled like a distillery [Tr. 3425].

The Court: Overruled.

Mr. Keith: No foundation.

The Court: Overruled. All goes to the—may go to the question or factor that prompts or does not prompt the refusal to sell. I don't know. Go ahead. There's been testimony heretofore on this subject.

The Witness: What was the question, please?

Mr. Johnston: Would you read the question, Mr. Reporter.

(Question read by the reporter.)

The Witness: We had some general complaints on it.

Mr. Johnston: About his drinking?

The Witness: That he had alcohol on his breath.

Mr. Johnston: Q. You reported this to Mr. Freeman, didn't you? A. Yes, I did.

Q. You knew that Mr. Freeman told Mr. Neermann to quit drinking on the job; isn't that right? A. Yes.

Q. As a matter of fact, Mr. Neermann was discharged, wasn't he, for showing up drunk at the job? A. Yes, he was."

Mr. Mitchel was of the opinion that a closed-front membership operation did not offer the potential that a retail store open to the public did, and that it was his view that Maytag products should be available to anyone who wished to purchase them without regard to his being a member of a particular group [Tr. 3379, 3428].¹⁰

¹⁰There is no evidence in the record of a demand for Maytag items in connection with Manfree's operation as a non-member-
(This footnote is continued on the next page)

The three reasons Mr. Mitchel testified to for not renewing the Manfree franchise [Tr. 3379], were a legitimate exercise of business judgment.

In contrast with Mr. Neermann's unwillingness to receive information as to the Maytag line, the Hale salesmen had no such reluctance after Mr. Mitchel came to the San Francisco area [Tr. 3318-3319].

A refusal to deal based on legitimate business reasons is not in violation of the antitrust laws.

In *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), the plaintiff, a motion picture theatre exhibitor, brought a treble damage action under the antitrust laws claiming a conspiracy among distributors and exhibitors of motion pictures to deprive him of product. The District Court granted the defendant's motion for a directed verdict at the conclusion of plaintiff's case. The language of the Court of Appeals in affirming the trial court is appropriate here, pages 305-306:

"In addition, there was considerable documentary evidence, not challenged or answered, indicating that 'plaintiff was a difficult, if not unreliable, man with whom to transact business.' As a whole the record seems at least as consistent with legitimate business decisions by the distributors in favor of the Garden or the Lawler as with a planned exclusion of plaintiff from the first-run market."

ship retailer (Op. Br. 74-76). Plaintiff's counsel withdrew his offer of Exhibit for Identification 4165 page 46, *infra*. In the absence of a demand, there cannot be a refusal to sell. *Royster Drive-In Theatres v. American Broadcast, Etc.*, 268 F. 2d 246, 251 (2nd Cir. 1959) cert. den. (1959) 361 U.S. 885; *Brown v. Western Massachusetts Theatres Inc.*, 288 F. 2d 302, 305 (1st Cir. 1961); *Webster Rosewood Corp. v. Schine Chain Theatres Inc.*, 263 F. 2d 533, 536 (2nd Cir. 1959) cert. den. (1959) 360 U.S. 912.

In *Alpha Distributing Co. of Cal. v. Jack Daniel's Distillery*, 207 F. Supp. 136 (N.D. Cal. 1961) aff'd per curiam 304 F. 2d 451 (9th Cir. 1962), it was claimed by plaintiff that defendants had violated the antitrust laws in that plaintiff was deprived of its distributorship by the defendants' supplier. In denying an injunction *pendente lite*, the District Court said at page 138:

There is no requirement of defendants "to indefinitely entrust the marketing of their product in a wide area to a distributor with whom a relationship of confidence and cooperation has become impossible."

In *Deltown Foods, Incorporated v. Tropicana Products, Inc.*, 219 F. Supp. 887 (S.D.N.Y. 1963) which was an action under the antitrust laws involving a cancellation of a distributorship, the Court said at page 890 in denying plaintiff's application for a preliminary injunction:

"The essence of defendants' position is that all that is involved here is a refusal to deal, which was justified because of the damage plaintiffs could do to defendants' product by treating it as second best while promoting their own private brand over Tropicana. Such refusal to deal, defendants say, is not unreasonable nor in violation of the antitrust laws, citing *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F. 2d 653, 657 (1st Cir), cert. denied, 368 U.S. 931, 82 S. Ct. 368, 7 L.Ed. 2d 194 (1961), where Judge Aldrich stated: 'As we have had occasion to observe before * * *, the antitrust laws do not require a business to cut its own throat.'"

See also *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656, 667 (9th Cir. 1963), cert. den. 375 U.S. 922 (1963).

Additionally, Mr. Mitchel decided not to renew twenty to thirty other franchises, including those of defendants Lachman Bros. and Sterling Furniture, which were to expire at the same time as the Manfree franchise [Tr. 3332-3333, 3430]. The fact that Maytag's conduct was not aimed solely at Manfree dispels any possible inference of conspiracy. *Independent Iron Works, Inc.*, *supra*, page 664.

C. There Was No Parallel Conduct by Defendants.

Plaintiffs charged a heterogeneous group with a conspiracy to boycott. It is difficult to conjure up Maytag, which is exclusively in the laundry appliance business (Op. Br. 8), conspiring with those who are exclusively in the television and electronics business, such as Motorola, Inc. [R. 7], Radio Corporation of America (Op. Br. 10), Sylvania Electric Products, Inc. [R. 6], Zenith Radio Corporation [R. 7].

Absence of parallelism is demonstrated by the following. Some distributors sold to Manfree. Others did not. Those that did sell did so for non-identical periods [Pl. Ex. 1523]. Plaintiffs' Exhibit 1523 shows the diverse time periods during which alleged co-conspirators dealt with Manfree: Defendant Lancaster stopped selling to Manfree in November of 1957 and Maytag did not commence selling to Manfree until January of 1958. Graybar Electric Co., an alleged co-conspirator (Op. Br. 8), the distributor of the Hot-point line manufactured by defendant General Electric, commenced selling Manfree in May of 1957 and

ceased selling it in October of 1958. Defendant Frank L. Edwards Co., the distributor of defendant Sylvania's products, started selling to Manfree in July of 1957 and terminated its dealings with Manfree in May of 1958. Defendant California Electric Supply Company began selling defendant Philco's products to Manfree in May of 1957 and stopped selling in September of 1958 [Pl. Ex. 1523].

Defendant Macy's bought no units from Maytag in 1960 [Pl. Ex. 641]. Defendant Redlick purchased nothing from Maytag in the years 1960, 1961 and 1962 [Pl. Ex. 641].

It will be remembered that Maytag did not renew the Manfree franchise which expired on May 31, 1959 [Tr. 3375].

The evidence above referred to negates a conspiracy to boycott by the defendants. If Macy's or Redlick exerted pressure on Maytag to discontinue its business relationship with Manfree, why then did they not purchase from Maytag after it ceased to deal with Manfree.

The non-similarity of conduct of alleged co-conspirators was held to be significant evidence of non-conspiratorial conduct in *Dipson Theatres v. Buffalo Theatres*, 190 F. 2d 951, 954 (2nd Cir. 1951) cert. den. 342 U.S. 926 (1952), and in *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302, 305-306 (1st Cir. 1961).

Appellants have cited three cases in support of their assertion that cancellations which are not exactly simultaneous do not detract from parallelism (Op. Br. 129-130):

Standard Oil Co. of California v. Moore, 251 F. 2d 188, 196-204, 205-211 (9th Cir. 1957), cert. den. 356

U.S. 975 (1958); *Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F. 2d 594, 596-597 (2nd Cir. 1949); *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939).

We do not contend that parallelism must be precisely identical, however, by the very definition of the term, at least similarity of conduct must exist. In the *Moore* case refusals to deal occurred within a month of each other, pages 206-207. In the *Interstate* case the Court observed that a conspiracy may be formed by other than simultaneous action or agreement. However, in using this language, we believe the Court was referring to something other than parallel conduct to attempt to prove a conspiracy. The pertinence of the *Bordonaro* case is not apparent.

The asserted conspiracy, except as to Maytag, according to plaintiffs, is known to have existed in May of 1957 as appears from the answers to Maytag's interrogatories (Appellants Specification of Errors, P. xxxi). Appellants cannot rely upon parallel conduct to show the establishment of a conspiracy in 1957, for no parallelism existed at that time. The formation of the asserted conspiracy then must be predicated on other purported acts and as to those there is no evidence.

D. Assuming, Arguendo, Parallelism Existed, There Was No Consciousness of It on the Part of Maytag.

Mr. Mitchel testified that he didn't know what brands were being displayed by Manfree [Tr. 3357]. Mr. Mitchel's testimony was not contravened.

In *United States v. Standard Oil Co. (Ind.), et al.*, Cr. 2199 (N.D. Ind. 1964), *A.B.A. Jury Instructions*

in *Criminal Antitrust Cases*, 412, 432 [1965], which was a criminal prosecution for violation of the Sherman Act, the Court gave the following instruction to the Jury at page 432:

“However, it is necessary that a party have knowledge of the existence of a conspiracy before he can become a party to it. A person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of a conspiracy, does not by such conduct become a conspirator. A party cannot knowingly participate in a conspiracy unless he is aware of it and acts in a common understanding with the other parties to further its purpose.”

Assuming a plaintiff could establish a conspiracy through parallel conduct, it would be essential to show knowledge of such parallelism for one to become a party to the conspiracy under the rule of the case cited immediately above.

Indeed, what has been said as to lack of knowledge by Maytag of parallelism extends in this case beyond that, for there is no evidence of Maytag’s knowledge of any conspiracy whether it is attempted to be proved by claimed parallel conduct or otherwise.

E. Assuming, Arguendo, Conscious Parallelism Existed, Such Is Not Proof of a Conspiracy.

The committing of similar acts by several persons knowing of such similarity does not prove conspiracy.

In *Theatre Enterprises v. Paramount*, 346 U.S. 537 (1954), the Supreme Court held (pp. 540-541):

“The crucial question is whether respondents’ conduct toward petitioner stemmed from independ-

ent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

Parallelism in business conduct, even where it is conscious and with knowledge of the manner in which others act, does not prove a conspiracy. The Court so held in granting a motion for a directed verdict in *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746-747, (N.D. Cal. 1959) affirmed (9th Cir. 1963) 322 F. 2d 656, cert. den. (1963) 375 U.S. 922:

"* * * there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a sub-

stitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. * * * The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy.”

The District Court was affirmed by the Court of Appeals which held that conscious parallelism standing by itself cannot support an inference of conspiracy (322 F. 2d 661):

“The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * * Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present ‘under circumstances which logically suggest joint agreement, as distinguished from individual action.’ ”

In *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), the Court made the following apt observation regarding the significance of conscious parallelism, page 305:

“Plaintiff’s petition for rehearing suggests that he has not fully understood our opinion with regard to conscious parallelism. Whatever this term means, it must be something more than mutual awareness of similar conduct. This awareness must be an element entering into each party’s decisional process, and the basis for inferring that it

did so must be something more substantial than a guess. For everyone to run out of the building when there is a cry of 'Fire,' or to stand in a queue at a bus stop, is not conscious parallelism."

F. The Specific Charges of Appellants Are Not Evidence of a Conspiracy.

1. The Sale of Merchandise to Hale by Maytag in February of 1959 Is Not Evidence of a Conspiracy.

In February of 1959 Maytag sold Hale \$10,848.00 of merchandise. Although it is our position that such a sale has no probative value because it occurred before the date plaintiffs claimed Maytag entered into the asserted conspiracy, to wit, April 30, 1959, which subject will be discussed *infra*, pages 49-51, however, assuming such evidence has a place in this case, it does not prove a conspiracy.

During the years 1958 through 1962 Maytag sold to more than 45 dealers in the San Francisco area [Pl. Ex. 641, 4161]. Of these only five are named as co-conspirators.

A supplier is privileged to prefer one customer over another, and the act of so doing does not establish a conspiracy.

In *Hudson Sales Corp. v. Waldrip*, 211 F. 2d 268 (5th Cir. 1954) cert. den. 348 U.S. 821 (1954), it appeared that the District Court had found a conspiracy in violation of the antitrust statutes, in that an automobile dealer was required to give up dealerships for makes of cars other than Hudson. The Court of Appeals reversed the lower court, saying at page 274:

"Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on

the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products.”

In *Schwing Motor Company v. Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md. 1956), another automobile dealership case similar to the one immediately above, the Court dismissed plaintiff’s complaint, holding at page 903:

“A manufacturer may prefer to deal with one person rather than another, and may grant exclusive contracts in a particular territory. *Windsor Theater Co., v. Walbrook Amusement Co.*, 4 Cir., 189 F. 2d 797. Unless his contract so provides, a dealer once appointed has no tenure, no right to a renewal of his contract.”

The *Schwing* case was affirmed in a memorandum opinion *sub nomine*, *Schwing Motor Company v. Hudson Sales Corporation*, 239 F. 2d 176 (4th Cir. 1956), cert. den. 355 U.S. 823 (1957).

In *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F. 2d 797 (4th Cir. 1951), the Court said at page 799:

“This Court cannot see how the preference of one exhibitor over another is, *per se*, a combination in restraint of trade.”

The cases cited at pages 18-20, *supra*, are also pertinent here.

2. The Furnishing of Advertising Allowances to Dealers Is Not Evidence of a Conspiracy.

Hale was furnished a substantial advertising allowance by Maytag in February of 1959. The supplying of advertising allowances to dealers other than Manfree is no more conspiratorial than sales to other dealers. That Maytag provided advertising funds, however denominated, to many retailers in the San Francisco area [DMT Ex: 13098-13100; 13101-13104; 13105-13112, 13114; 13120-13121; 13124-13127; 13133, 13135, 13136, 13138-13140; Tr. 3343, 3345, 3367], is not proof of the conspiracy charged by plaintiffs. The furnishing of so called special advertising funds was not limited to the retailer defendants [Tr. 3345, 3367].

Without discussion of the question that a vendor may condition the use of advertising funds upon the maintenance of suggested retail prices, plaintiffs fail to show that Maytag indulged in any such conduct. Indeed, the evidence of Maytag supplying advertising funds to those selling below suggested retail prices is a complete refutation of any possible charge that Maytag was attempting to enforce adherence to list prices through the use of advertising funds, regardless of the appellation given such funds (page 13 *supra*).

3. The Increased Purchases of the Maytag Line by Hale After the Non-Renewal of the Manfree Franchise, Are Not Evidence of a Conspiracy.

Contrary to Appellants' assertion that Hale made no purchases from Maytag in the year 1958 (Op. Br. 46-47), Plaintiffs' Exhibit 641 shows the purchase of fifty-two (52) units in that year. Admittedly Hale made larger purchases in subsequent years. The fact

that fewer Maytag units were purchased in 1958 by Hale than thereafter or theretofore, was the natural consequence of the disenfranchisement of Hale by Maytag in 1958 [Tr. 1102-1104].¹¹ The reason given by Mr. Sanford of Hale for the disenfranchisement was poor performance by Hale [Tr. 1102, 1108-1109]. When Maytag cancelled the Hale franchise in 1958 its sales representative was Mr. Fenn Wilson [Tr. 1108-1109]. After Mr. Wilson's successor, Mr. Mitchel, assumed the position of regional manager, he made intensive efforts to interest the sales personnel of Hale in the Maytag line [Tr. 3318-3319, 3321-3322, 3327-3328]. It is properly inferable that these efforts bore fruit in the increased purchases by Hale of Maytag items.

Again, the decision on the part of a supplier to deal with a particular customer is not proof of a conspiracy (pages 18-20, 26-27, *supra*).

4. There Is No Evidence That Maytag Was in Any Way, Individually or Collaboratively, Involved in the Plaintiffs' Claimed Inability to Advertise in San Francisco Newspapers.

Appellants have failed to point to any portion of the record which evidences implication of Maytag in the as-

¹¹Appellants claim that Hale did not advertise Maytag in 1958 (Op. Br. 37, 90, 113) and, in "proof" of this, refer to Pl. Ex. 4153. Said exhibit refers only to instances of cooperative advertising funds being supplied Hale [Tr. 1119], and is not proof that Hale did not advertise Maytag at Hale's sole expense. The evidence is undisputed that Hale did advertise Maytag during a portion of the year 1958 [Tr. 1096-1097].

The significance of not furnishing cooperative advertising funds is not apparent when it is noted that Pl. Ex. 4153, which begins with March, 1957, shows no cooperative advertising furnished Hale from March, 1957 through September 1957, which period antedates the time when Maytag started to deal with Man-free in January, 1958 [Pl. Ex. 1523]. Hale purchased 187 units from Maytag in 1957 [Pl. Ex. 4161].

sented inability of the plaintiffs to advertise in certain San Francisco newspapers.

There is no evidence that Maytag supplied advertising funds to Manfree on the condition that it would not advertise in a particular newspaper. The policy of price advertising by Manfree insofar as Maytag was concerned was no different than with any other dealer [Tr. 3341-3342].

5. The Evidence Regarding Trade Associations Does Not Make Out a Prima Facie Case of Maytag's Participation in the Alleged Conspiracy.

a. *Membership in Trade Associations and Participation in Their Activities Are Not, as Such, in Violation of the Antitrust Laws.*

Maple Flooring Mfrs. Asso. v. United States,
268 U.S. 563 (1925);

District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Ass'n., 83 F. Supp.
994, 998 (D.D.C. 1949).

In *United States v. The Sherwin-Williams Co., et al.*, Cr. 12789 (W.D. Pa. 1948), *A.B.A. Jury Instructions in Criminal Antitrust Cases* (1965) 267, at page 294 the Court stated the law to be as follows in instructing the jury:

"I mean by this that a membership in any trade association is not unlawful in itself. There is no law which makes it unlawful for the defendants to be members of any trade association which has been mentioned in the testimony, or to participate in their committees, their meetings, or their activities."

Admittedly The Maytag Company was a member of American Home Laundry Manufacturers Association, commonly known as AHLMA, and certain of The Maytag Company representatives participated in some of the activities of AHLMA. It should be mentioned that Appellants do not contend Maytag was a member of National Electric Manufacturers Association (NEMA) [Tr. 3494], of Electric Industries Association (EIA) (Op. Br. 74), of Northern California Electrical Bureau (NCEB) (Op. Br. 108), nor of the San Francisco Better Business Bureau (BBB) (Op. Br. 108).

There is no evidence that U.S.E. or Manfree or any of the defendant retailers were the subject of discussion at AHLMA meetings. The following significant testimony of Mr. Ely, an officer of Maytag, of what transpired at AHLMA meetings regarding this subject is uncontravened: [Tr. 3502-3503].

“Q. Now, did there ever come to your attention a discussion of the discount store picture, or the problems, Mr. Ely, the subject matter that certain department stores would not buy merchandise if they were being sold to discount stores? A. No.

Q. That never arose? A. No.”

Trade associations at most may provide an opportunity to conspire, but they cannot be a substitute for proof of the essential elements of a conspiracy.

Maple Flooring Mfrs. Asso. v. United States,
268 U.S. 563, 586 (1925.)

See

United States v. Penn-Olin Chemical Company,
217 F. Supp. 110, 133-134 (D. Del. 1963).

The guilt by association concept is not recognized in our law. The following statement in the *Penn-Olin* case is pertinent (pages 133-134):

“A finding of illegality in this area, if it is to be made, must rest upon an inference that a substantially lessening of competition between Pennsalt and Olin in non-chlorates will probably result because of the opportunity which their representatives have to make anticompetitive agreements when they meet in connection with Penn-Olin’s affairs. Such an inference is incompatible with the holding in *Maple Flooring Mfrs’ Ass’n. v. United States*, 268 U.S. 563, 45 S.Ct. 578, 69 L. Ed. 1093 (1925).”

b. *Plaintiffs’ Exhibit 2, The AHLMA Code, Is Not Evidence of a Conspiracy.*

The Appellants attempt to attach some conspiratorial significance to a booklet issued by AHLMA bearing the date June, 1960, entitled Recommended Advertising Practices for the Home Laundry Appliance Industry [Pl. Ex. 2].

Appellants assert that Maytag required retailers to sign affidavits that they had engaged in no comparative price advertising and cite in support of this certain exhibits and exhibits for identification (Op. Br. 108). Of the exhibits referred to only one, Plaintiff’s Exhibit 2, has any connection whatsoever with Maytag. Plaintiff’s Exhibit 2 can be searched in vain for any requirement that Maytag, or any other manufacturer of laundry appliances, required retailers to sign affidavits that they had not engaged in comparative price advertising.

An examination of Plaintiff's Exhibit 2 will demonstrate that it was an honest attempt to follow the precepts of the Federal Trade Commission and, in fact, of the total of the sixteen pages in the exhibit, eleven are devoted to a reprint of guides adopted by the Federal Trade Commission, and furthermore, the introductory page contains the following language [Pl. Ex. 2; Tr. 3513-3514]:

“‘AHLMA's Recommended Advertising Practices are intended to be consistent with these Federal Trade Commission publications and to provide a guide in layman's language to certain specific situations in the home laundry appliance industry. AHLMA's Recommended Advertising Practices are not intended to replace or to be a digest of the Federal Trade Commission publications.

“It is urged that the Federal Trade Commission publications as well as AHLMA's Recommended Advertising Practices be carefully studied and kept in mind at all times.’”

The AHLMA Code [Pl. Ex. 2] undertook to do nothing more than to encourage by the giving of examples, non-deceptive advertising and sales practices, It had nothing whatever to do with suggesting to retailers, or anyone else, to sell or not to sell at list prices. It is apparent that its purpose was only to be a guide in avoiding dishonest representations. The only significance of the phrase “list price” as used at pages 1 and 6 of Plaintiff's Exhibit 2 was to discourage the use of that term by an advertiser to indicate that a savings was available to a consumer when the advertised list price was not the usual and customary retail price.

It should be noted parenthetically that Appellants have again misstated the record in erroneously assert-

ing that the portion of Plaintiff's Exhibit 2 not prepared by the Federal Trade Commission is significantly different from the advertising practices recommended by the Federal Trade Commission, in that the Federal Trade Commission guides make no reference to list price (Op. Br. 73). At page 6 of Plaintiff's Exhibit 2, which is a reprint of Guide Against Deceptive Pricing issued by the Federal Trade Commission, we find the following:

“Examples of phrases used in connection with prices which have been held to be representations of an article's usual and customary retail price are:

‘*Maker's List Price*’

‘*Manufacturer's List Price*’

‘Manufacturer's Suggested Retail Price’

‘Sold Nationally At’

‘Nationally Advertised At’

‘Value’ ” (Emphasis added)

The quotation from page 6 of Plaintiff's Exhibit 2, *supra*, expressly recognizes that a “list price” may be used in advertising.

It is evident from a reading of Plaintiff's Exhibit 2 that the first four pages thereof, which are not Federal Trade Commission material, constitute an effort to specifically apply general Federal Trade Commission guides to home laundry appliances. It will be noted in reading pages 6-8 of Plaintiff's Exhibit 2, that the guides there set forth and adopted by the Federal Trade Commission purport to cover product lines in general.

For instance, at page 7, there is a reference to a dacron suit, and at page 14 to tires.

The Appellants assert that the members of AHLMA agreed not to seek Federal Trade Commission review or approval of AHLMA's advertising code (Op. Br. 164). With respect to Appellants' assertion, the following uncontradicted evidence shows that the AHLMA Code was in fact submitted to and reviewed by the Federal Trade Commission with favorable comment [Tr. 3490-3491].

"Q. Did you take this code to any officer of the Federal Trade Commission? A. I believe it was submitted to the Federal Trade Commission.

Q. Did they approve it? A. I believe they complimented the industry, as I recall, for having done it."

c. *Assuming, Arguendo, That AHLMA and Its Members Were Engaged in a Conspiracy, It Was Not the Conspiracy Charged by Plaintiffs.*

As noted above, there is absolutely no evidence that AHLMA conspired to boycott the Appellants.

We would not devote space to this specious theory were it not for the possibility that Appellants may have tried to claim, although their language is extremely ambiguous, that trade associations were co-conspirators (Op. Br. 12). It should be noted further that the record references given in Appellants' Opening Brief, page 12, do not support this claim, if it is a claim.

AHLMA's membership included all of the manufacturers of home laundry appliances save one [Tr. 3484]. Omitted from this number, in the case at bench, as defendants or asserted co-conspirators are the following [Pl. Ex. 2, p. 4].

ABC
ARMSTRONG
BARTON
BLACKSTONE
DEXTER
EASY
HAMILTON
IRONRITE
KELVINATOR

KENMORE
LAUNDROMAT
LEONARD
O'KEEFE & MERRITT
ONE MINUTE
SPEED QUEEN
STIGLITZ
WARD'S SIGNATURE

If the AHLMA Code were the product of some conspiracy participated in by manufacturers of home laundry appliances, which is a completely unfounded assumption, that "conspiracy" is different than the one asserted by plaintiffs, in that of the 25 manufacturers whose names appear on Plaintiff's Exhibit 2, p. 4, the AHLMA Code, only 7 were claimed to be defendants or co-conspirators.

The asserted existence of conspiracy whose members are A, B, C and D, is not evidence of the existence of an asserted conspiracy whose members are A, X, Y and Z.

Steiner v. 20th Century Fox Film Corporation,
232 F. 2d 190, 196 (9th Cir. 1956);

Dipson Theatres, Inc. v. Buffalo Theatres, Inc.,
190 F. 2d 951 (2nd Cir. 1951) cert. den. 342
U.S. 926 (1952);

*Paramount Film Distributing Corp. v. Village
Theatre*, 223 F. 2d 721, 727 (10th Cir. 1955);

Kotteakos v. United States, 328 U.S. 750 (1946).

6. There Was No Vertical Conspiracy Between
Maytag and Hale.

Appellants have charged the existence of a vertical price fixing conspiracy between Hale and Maytag (Op. Br. 14).

Contrary to Appellants' assertion, the trial court did not limit Appellants to the proof of a horizontal conspiracy. The court's order [R. 1608-1609] contains no such restriction.

The conspiracy asserted by plaintiffs was one they claimed existed among manufacturers, distributors and retailers. A conspiracy among competitors is customarily termed a horizontal conspiracy.

Van Cise, Understanding the Antitrust Laws,
pp. 157-164 (1966).

Regardless of whether the plaintiffs choose to denominate the claimed conspiracy as horizontal or vertical, the result is the same. There was no conspiracy.

If Appellants intend to assert that there was a conspiracy between Hale and Maytag for the purpose of the maintenance by Hale of retail prices, it is not apparent how this could give rise to any additional claim by plaintiffs after the Manfree franchise was not renewed by Maytag.

If Appellants contend that there was a price maintenance scheme between Hale and Maytag and that to effectuate it Maytag refused to further deal with Manfree, all of what has been said *supra* regarding the lack of proof of a horizontal conspiracy also necessarily impels the conclusion there was no vertical conspiracy.

In further negation of the existence of such a vertical conspiracy, the following is significant.

There is no evidence that Hale nor any of the retailer defendants were treated any differently than the other retailers, approximately 45 in number, sold by Maytag after the non-renewal of the Manfree franchise. No claim was made of conspiratorial conduct on the part of any of said 45 retailers.

It is important to note again that twenty to thirty other franchises given by Maytag were not renewed at the same time that the Manfree franchise expired [Tr. 3332-3333, 3430]. Appellants do not assert that Hale and Maytag conspired to boycott these twenty to thirty dealers.

It would be more consistent with the existence of a vertical conspiracy between Hale and Maytag if plaintiffs had been able to demonstrate, which they could not, that Maytag dealt exclusively with Hale.

We repeat again that Maytag had the right to select its customers and to prefer to deal with one customer rather than another (pages 18-20, 26-27, *supra*).

II.

THE COURT'S EXCLUSION OF CERTAIN EVIDENCE WAS NOT ERROR.

A. Plaintiffs Stated That Maytag Became a Member of the Conspiracy on April 30, 1959.

In a sworn answer to interrogatories propounded by Maytag, plaintiffs stated the conspiracy, *of which Maytag became a member on April 30, 1959* was commenced prior to that time, and is known to plaintiffs to have existed in May 1957 [R. 958, 961]. A further portion of the answer may be found in Appellants' Specification of Errors, page xxxi.

Appellants complain of the exclusion of an asserted conversation between Mr. Bernard Freeman, an officer of plaintiffs, and Mr. John P. Mitchel, regional manager of Maytag West Coast, and of the exclusion of Pl. Ex. for Id. 565. The purported conversation occurred prior to April 30, 1959 [Tr. 5786-5787], and the document from what appears on the face of it, was prepared before that date [Pl. Ex. for Id. 565].

Heading G of Appellants' Brief at page 153 where this subject is treated reads as follows:

"G. *The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Maytag In The Conspiracy To Boycott Appellants.*"

Plaintiffs' counsel at the trial reaffirmed the date of the claimed entry of Maytag into the asserted boycott conspiracy. At [Tr. 5784] there appears the following:

"Mr. Johnston: The sworn answer is that Maytag became a member of the conspiracy on April 30, 1959.

Mr. Keith: That would be true insofar as the boycott is concerned but not insofar as the Maytag control of pricing is concerned."

It should be noted that Appellants, in attacking the Court's ruling under heading G, *supra*, allude only to what they claim was a boycott conspiracy, and at page 153 of their Brief Appellants state:

"This testimony related to the alleged reasons why Maytag would not sell to Manfree, and therefore the reasons why it chose to participate in the *boycott conspiracy*." (Emphasis added).

In response to an inquiry from the Court, plaintiffs' counsel, with respect to the evidence he complains was excluded, stated the reason for tendering the evidence was that it was a conversation made by a co-conspirator in furtherance of the conspiracy. The following transpired [Tr. 6060]:

"The Court: Mr. Keith, do you contend the conversation involved which you wish to offer in evidence is a conversation made by a co-conspirator in furtherance of the conspiracy?

Mr. Keith: Oh, yes, Your Honor.

The Court: And Mr. Mitchel is the co-conspirator?

Mr. Keith: Yes, Your Honor.

The Court: And he is an employee of whom?

Mr. Keith: Maytag."

The Court in the exercise of its discretion properly excluded testimony by Mr. Freeman as to an asserted conversation with Mr. Mitchel antedating April 30, 1959, and also correctly refused to admit Pl. Ex. for *Id.* 565.

In *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656 (9th Cir. 1963) cert. den. 375 U.S. 922 (1963), plaintiff's case was based upon an asserted conspiracy to boycott. Plaintiff had given defendants a release with respect to acts occurring before 1955. It then offered evidence antedating this date. The Court held that the refusal to receive such evidence was not error and stated at pages 669, 670:

"Part of such evidence consisted of proof of the manner in which U.S. Steel and Bethlehem had distributed steel to plaintiff and others prior to 1955, the period in issue. Plaintiff's counsel, at a

pre-trial conference, stated that this would be offered as collateral proof of plaintiff's charges of conspiracy and monopolization and that it related to 28 jobs carried on from 1950 through 1954. The judge, however, demurred, observing that the evidence was of limited use and that its introduction would require a tremendous amount of trial time. Thereupon counsel, stating that they could reduce the number, selected nine of the jobs initially proposed. However, the judge considered that nine were too many and, by pre-trial order, limited plaintiff to proof of two—the so-called 13th Street Freeway job undertaken by plaintiff in 1953, and the University of California Teaching Hospital job performed by the Moore Dry Dock Company.

“The admission of collateral evidence is a matter addressed to the discretion of the trial judge [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 230, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)], and we are clear that here the rulings complained of did not constitute an abuse of discretion.

“In the words of Justice Holmes, the reason for excluding such evidence is ‘a purely practical one, —a concession to the shortness of life.’ *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887). It is manifest from the transcript of the pre-trial conferences, where the subject was discussed at length, that an excursion into each of these incidental matters could and probably would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably. The

Judicial Conference of the United States, in its Report on Procedure in Anti-trust and Other Protracted Cases (1951), has frowned upon a liberal exercise of judicial discretion in allowing collateral proof saying 'Such evidence as is merely "possibly helpful", or which merely supplies "atmosphere" or "background", may be rigidly excluded,' a view to which we heartily subscribe."

In *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*, the Court also noted at page 669 that Kaiser, one of the defendants, was not asserted to be a party to the alleged conspiracy until after the acts constituting the proffered evidence took place.

Courts will not permit the relitigation of acts or conduct of defendants antedating a release.

Suckow Borax Mines Consol. v. Borax Consolidated, 185 F. 2d 196, 206-207 (9th Cir. 1950), cert. den. 340 U.S. 943 (1951), reh. den. 341 U.S. 912 (1951);

Solar Electric Corp. v. General Electric Co., 156 F. Supp. 51, 58 (W.D. Pa. 1957).

If it is not error to exclude pre-release evidence when offered to establish a conspiracy following the release, then *a fortiori* the acts and declarations of Maytag prior to the date Appellants assert Maytag joined the asserted conspiracy were properly excluded.

Futhermore, as noted above, the testimony desired to be adduced was offered by plaintiffs on the ground it was in furtherance of the conspiracy (page 40, *supra*). Overt acts of a party occurring before that party joins a conspiracy cannot prove such party's participation in the conspiracy.

See *Marshall v. United States*, 355 F. 2d 999 (9th Cir. 1966) cert. den 385 U.S. 815 (1966), reh. den. 385 U.S. 964 (1966), in which the Court said at page 1004:

“There is no question that the overt acts charged must effect the object to the conspiracy, and until the conspiracy comes into existence, no act occurring prior thereto can effect it.”

In *Dahly v. United States*, 50 F. 2d 37, 42 (8th Cir. 1931), a criminal conspiracy case involving an attempt by defendants to bribe United States customs and narcotics officers, the Court stated at page 42:

“Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together, *but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.*” (Emphasis added).

In *Steiner v. 20th Century-Fox Film Corporation*, 232 F. 2d 190 (9th Cir. 1956), the Court said at pages 192-193:

“An overt act must accompany or follow the agreement, and must be done in furtherance of the object of it. *Blumenthal v. United States*, 9 Cir., 1946, 158 F. 2d 883, affirmed 1947, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154; . . .”

A word should be said concerning *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In the *Continental Ore Co.* case the plaintiffs in the trial court attempted to introduce evidence of a conspiracy and overt acts pursuant thereto in the early 1930's. Such evidence was excluded by the trial court on the ground that one of the plaintiff's did not arrive in the United States until 1938. The refusal to admit the tendered evidence was held to be error by the Supreme Court. Certainly the *Continental Ore Co.* case which was cited in *Independent Iron Works, supra*, at page 661 of the opinion does not stand for the proposition that evidence of acts prior to claimed participation in a conspiracy must be admitted.

B. There Was No Offer of Proof as to Mr. Freeman's Asserted Conversation With Mr. Mitchel.

The only offer of proof made as to Mr. Freeman's conversation with Mr. Mitchel was that plaintiff's counsel advised the Court that Mr. Freeman's testimony would explain a certain letter [Pl. Ex. 567], [Tr. 5786].

An offer of proof must be *specific*, as is set forth in *Fed. R. Civ. P. 43(c)*:

"(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a *specific* offer of what he expects to prove by the answer of the witness." (Emphasis added).

The function of an offer of proof is to enable an appellate court to determine whether error has been committed in excluding evidence.

In *Frisone v. United States*, 270 F. 2d 401 (9th Cir. 1959), the Court stated the following rule of law at page 402:

“The purpose of an offer of proof is to make a record so that an appellate court can get a clear idea of whether error has been committed in sustaining objections to questions asked.”

Simply stating that testimony is going to explain a letter could not possibly enlighten this Court on the question of whether or not error had been committed.

C. Certain Evidence Was Properly Excluded for Reasons Other Than Maytag's Assertedly Becoming a Member of the Claimed Conspiracy on April 30, 1959.

Appellants assigned error in the exclusion of the following documents; Plaintiff's Exhibits for *Id.* 565, 4165, 1079 and 1089.¹²

Plaintiffs' exhibit 565 antedated Maytag's asserted entry into the alleged conspiracy April 30, 1959, and for the reasons herein stated was without probative value. However, valid independent grounds were urged and sustained by the Court in its rulings excluding the documents.

With respect to Plaintiffs' Exhibit for *Id.* 565, a handwritten document, the ruling of the Court based upon counsel's objection that there was no foundation

¹²The pertinence of Pl. Ex. for *Id.* 1089 is not apparent. This document is a Credit Memo of Maytag giving Hale a credit of \$12.00 by reason of incorrect invoicing of a prior purchase.

[Tr. 3341-3343] was correct. Appellants have failed to point to any portion of the record in which the handwriting upon Plaintiffs' Exhibit for *Id.* 565 was identified.

The authentication of a writing requires proof that it was written by the person who purported to write it. *Witkin, California Evidence*, sections 672 and 673 (2d Ed. 1966).

As to Plaintiffs' Exhibit for *Id.* 4165, counsel for plaintiffs withdrew his offer of this document [Tr. 5791-5792].

With respect to Plaintiffs' Exhibits for *Id.* 1079 and 1089, the witness through whom they were attempted to be introduced, Mr. Sanford of Broadway-Hale, and not seen the documents before being shown them in Court [Tr. 1120]. The Court suggested that counsel for plaintiff reserve his offer until Mr. Mitchel of Maytag West Coast took the stand [Tr. 1122]. Counsel for plaintiff did not offer the documents through Mr. Mitchel. The Court properly exercised its discretion in deferring the tender in evidence of these documents for the reason that a foundation for the introduction could not likely be established through a witness who had never seen the documents.

The trial court has absolute jurisdictional discretion as to the order of proof.

Flintkote Co. v. Lysfjord, 246 F. 2d 368, 378 (9th Cir. 1957), cert. den. 355 U.S. 835 (1957).

D. The Exclusion of Certain Portions of the Alpine Deposition Was Not Error.

The District Court was correct in ruling that certain portions of the Alpine deposition should not be read into evidence, as is competently and thoroughly discussed in the Brief of Appellees General Motors Corporation and Frigidaire Sales Corporation, under heading V-A(3), to which reference is made.

With respect to Maytag, Appellants complain of the Court's refusal to permit the reading into evidence of pages 235-238 of the Alpine deposition (Appellants Specification of Errors p. xxv). An examination on this portion of the Alpine deposition discloses that Mr. Alpine purportedly had two conversations with Mr. Mitchel, and that notes or reports of these conversations were made [Dep. 238]. These notes or reports were not made available for inspection by counsel for the defendants until after the death of Mr. Alpine [Tr. 6216].

The lack of opportunity to cross-examine Mr. Alpine as to the notes of the conversations deprived Maytag of its right to test, among other things, the credibility of Mr. Alpine's testimony as is evident from what transpired at the deposition. Mr. Alpine testified that he made notes of conversations with distributors of major household appliances if he thought there was something discriminatory or harmful being done [Dep. 238].

The first of the two asserted conversations was to the effect that Mr. Mitchel told Mr. Alpine Manfree was considered one of Maytag's better Northern California accounts [Dep. 236]. Mr. Alpine was asked by

counsel as to whether this purported conversation, of which a note was made, suggested something harmful or discriminatory [Dep. 238, 239]. The witness was instructed by his counsel not to answer this question [Dep. 239], and a similar question as to why the witness made notes of the purported conversation [Dep. 239]. How the asserted statement that Maytag was one of Manfree's better accounts in Northern California was harmful or discriminatory is not apparent. Examination of Mr. Alpine as to this conversation with the advantage of having his report thereof, would have given defendants an opportunity, to which they were entitled, of developing testimony as to the credence which should be accorded Mr. Alpine.

Another example of the importance of having the notes in hand for cross-examination, is the testimony of Mr. Alpine that the first conversation he claims to have had with Mr. Mitchel took place five or six months after Manfree had been doing business with Maytag [Dep. 236, 237]. Mr. Alpine placed this time, *after looking at the reports*, as being in late 1958 [Dep. 237]. Plaintiffs' Exhibit 1523 shows that Maytag commenced doing business with Manfree in January of 1958. Mr. Mitchel testified that he came to the San Francisco area on January 1, 1959 [Tr. 3310]. As acknowledged by Appellants, Mr. Mitchel became the regional manager for Maytag West Coast in 1959 (Op. Br. 64). Thus, cross-examination as to the time the report was made bears on the credence of witnesses.

It is significant that Mr. Alpine consulted said reports while giving his testimony [Dep. 237].

The circumstances under which the reports were made, the time they were made, under whose direction they were made, and who collaborated in the preparation of them, are subjects of legitimate inquiry which Maytag was foreclosed from pursuing.

Furthermore, the two asserted conversations took place while Maytag was still selling Manfree [Dep. 235, 236].¹³ As pointed out herein pages 49-51, these conversations have no probative value because of Appellants' position that Maytag did not become a member of the alleged conspiracy until April 30, 1959. The Maytag franchise to Manfree expired on March 31, 1959 [Tr. 3375], consequently, the purported conversations between Mr. Alpine and Mr. Mitchel took place before plaintiffs claim that Maytag joined the asserted conspiracy.

III.

ACTS OF MAYTAG OCCURRING BEFORE APRIL 30, 1959 CAN NOT BE OVERT ACTS IN FURTHERANCE OF A CONSPIRACY AND HAVE NO PROBATIVE VALUE AS A BASIS FOR AWARDED DAMAGES.

As set forth, *supra*, pages 38-39, Appellants have stated that Maytag became a member of the alleged conspiracy on April 30, 1959.

The conduct which Appellants sometimes characterize in their Brief as anti-competitive occurring before April 30, 1959 consist of the following:

- (a) The testimony of Mr. Sanford of Hale that Mr. Mitchel of Maytag West Coast told

¹³Appellants do not assign error as to the exclusion of Mr. Alpine's testimony as to a third conversation between him and Mr. Mitchel, which Mr. Alpine testified took place after Manfree ceased to buy from Maytag West Coast.

him in January or February of 1959 [Tr. 1111, 1112], that he was working on a new distribution pattern and that he was also working on a completely new dealer structure (Op. Br. 113).

(b) Hale would not buy or advertise the Maytag line in 1958 (Op. Br. 46, 47, 190). It should be noted that Appellants' assertion is a misstatement of the record, *supra*, page 28.

(c) Hale gave Maytag West Coast a purchase order for \$10,848.00 in February of 1959 [Pl. Ex. 639], and was invoiced by Maytag West Coast for this amount on March 11, 1959 [Pl. Ex. 640-Op. Br. 46, 47, 90]. The undisputed testimony is that this purchase was for seven stores operated by Hale [Tr. 3382].

(d) Maytag West Coast advanced an advertising allowance of \$3,000.00 to Hale in February or March of 1959 [Tr. 1117; Pl. Ex. 4153; Op. Br. 46, 47, 90].

The items above referred to could not be in furtherance of the asserted conspiracy inasmuch as they occurred before April 30, 1959 the date, according to plaintiffs, when Maytag became a member of the alleged conspiracy. (*Marshall v. United States, supra*; *Dahly v. United States, supra*; and *Steiner v. 20th Century-Fox Film Corporation, supra*.)

Also, it is hornbook law that in a civil treble damage antitrust action, an overt act or acts are necessary to establish damage, and that damage cannot be predicated upon the existence of a conspiracy alone.

Timberlake, Federal Treble Damage Antitrust Actions, sections 3.04 and 3.06, pages 15, 16 (1965).

Overt acts antedating participation in the alleged conspiracy cannot prove the alleged conspiracy, nor can they be the basis for an award of damages. As to such acts being without effect with respect to proving damages, it was said in the *Independent Iron Works, Inc.* case, *supra*, pages 670-671:

“These actions had culminated in a settlement by the terms of which plaintiff released the defendants from all claims up to January 1, 1955; while the release would not render the facts constituting such claims inadmissible, *it did nullify them as the basis for an award of damages.* But how far a jury in a case of this magnitude could keep that fact in mind, although carefully admonished to do so, is at least problematical.” (Emphasis added).

Counsel for plaintiffs acknowledged correctness of the rule above referred to in *Independent Iron Works, Inc.*, *supra*, stating [Tr. 6062]:

“Now, all I know is this: We are being honest, we say the date that you refused to sell us is the date where we say you hurt us.”

Assuming the items referred to under this subheading are meaningful in any sense they are without probative force, in that they cannot prove Maytag's claimed entry into the alleged conspiracy, nor can they demonstrate that plaintiff was damaged by Maytag.

IV.

**THE COURT DID NOT COMMIT ERROR IN ITS
RULINGS ON DISCOVERY.**

The discovery matters, of which Appellants complain pertaining to Maytag, are so insubstantial as not to merit extended discussion. The somewhat vague complaints of Appellants are found at pages 20-21 and 172-177 of their Opening Brief, and pages xlii-xliii of their Specification of Errors.

The rulings as to Maytag involve three situations.

- (a) Those in which the items called for did not exist;
- (b) Those involving demands which were granted, and
- (c) Those requests of plaintiffs, at most two in number, which were denied.

In category (a) are the following:

Item 15 of plaintiffs' June 5, 1964 Motion for Production of Documents [R. 422, 425]. The response of The Maytag Company filed August 6, 1964 averred there were no documents in this category [R. 559, 561]. The Court's Order filed November 27, 1964 therefore properly denied production of the documents called for [R. 784, 786]. There was a similar Motion addressed to the distributor defendants, including Maytag West Coast Company, filed June 5, 1964 [R. 434, 437]. The response of Maytag West Coast Company filed August 6, 1964 [R. 554, 557], and the Court's Order filed November 27, 1964 [R. 787, 789], were the same as those pertaining to The Maytag Company.

Interrogatories 2, 3, 4, 5 and 6 of the group propounded by plaintiffs in September of 1964. As to these, the answers of The Maytag Company filed October 14, 1964 were as follows [R. 656, 657]:

“No such statement or statements or reports exist with respect to the operation of the retail defendants in the City and County of San Francisco.” [R. 656].

The Maytag West Coast answers filed October 14, 1964 were the same as those of The Maytag Company [R. 652, 653-654].

Items 22(c), (d) and (e) of Appellants’ Motion to Produce filed November 20, 1964 [R. 745, 750]. As to these items, in each instance the response of The Maytag Company was as follows [R. 851, 859]:

“No such documents exist.”

The Order of the Court denying the production of said documents filed February 9, 1965 was obviously proper [R. 1006, 1008].

Documents which do not exist cannot be in the possession, custody or control of a party, hence such party cannot be compelled to produce them.

Fed R. Civ. P. 34;

Moore, Federal Practice, Section 34.17. (2nd Ed., 1964).

Item 20 of plaintiffs’ Motion to Produce filed November 20, 1964 directed to the factory defendants,

falls into categories (a) and (c). Item 20 is here set forth [R. 745, 749]:

“20. All letters received by you or any department engaged in the distribution or manufacture of household appliances or television sets from the plaintiffs in the above action, and all notes, memoranda or intra office communications concerning such requests.”

The response of The Maytag Company filed December 28, 1964 at page 8, is as follows [R. 851, 858]:

“There are no ‘notes, memoranda or intra-office communications concerning such request’ in the Maytag files.”

The Court’s Order filed February 9, 1965 at page 3 was [R. 1006, 1008]:

“17. Paragraph 20 is denied, except that The Maytag Company shall produce any letters from plaintiffs to The Maytag Company which contain notes or memoranda by employees of The Maytag Company, and any notes, memoranda or inter-office communications relating thereto.”

There was patently no error in limiting the letters to be produced to those containing notes placed thereon by employees of The Maytag Company as plaintiffs, in the ordinary course of business, would have copies of its correspondence with The Maytag Company. There is no complaint by Appellants that such letters were not produced.

In category (b) are the following:

We are uncertain whether Appellants are asserting error with respect to the ruling made on their Motion

for Production of Documents filed November 17, 1964 addressed to the distributor defendants, including Maytag West Coast [R. 687]. At pages 20-21 of Appellants' Opening Brief reference is perhaps made indirectly to the rulings of the Court with respect to items 20 and 22(c), (d) and (e) of said last mentioned Motion. In any event, items 20 and 22 were granted by the Court in its Order filed February 9, 1965 [R. 1010, 1012]. There is no item 27 in said Motion directed to the distributor defendants [R. 687-693].

In category (c) is the following item:

The second item which may be classified as falling in category (c) is paragraph 27(f) of the Motion to Produce directed to the factory defendants, including The Maytag Company. The items requested were [R. 751-752, 745]:

"27. All letters or notes of minutes found in the files of any of your officers, agents or representatives who attended associations composed of two or more manufacturers of household appliances or television sets during the period 1957 or 1964 pertaining to the following, NEMA, EIA, GAMA and AHLMA."

* * * *

"(f) Discount Department Stores or Mass Merchandising Stores."

The response of The Maytag Company to this portion of said Motion was [R. 851, 862]:

"On the occasion of the hearing upon plaintiffs' first motion for production of the documents on August 7, 1964, the Court refused to require the production of minutes. The data called for by this

item and its subdivisions has no relevance to the actions, and no good cause is shown for the production thereof.”

The Court’s Order with respect to paragraph 27 was [R. 1006, 1008]:

“25. Paragraph 27 is denied, except that the Code of Ethics referred to in Subsection (e) of said Paragraph shall be produced.”

Apart from other considerations there is no averment in the Affidavit in support of the Motion as to the existence of the documents called for [R. 753, 772]. This is sufficient to deny their production.

Wharton & Lybrand v. Loss Bros. & Montgomery, 41 F.R.D. 177, 180 (E.D. N.Y. 1966);

Chapman v. Brown, 198 F. Supp. 78, 92 (D. Hawaii 1961).

V.

NO ERROR WAS COMMITTED AS TO SCOPE OF CROSS-EXAMINATION OR REHABILITATION ON REBUTTAL IN THE EXAMINATION OF WITNESSES.

With respect to Maytag, Appellants do not, in their Brief, discuss any claimed error in the examination of Maytag witnesses. In their Specification of Errors, pages xli-xlii, Appellants assign as error an asserted limitation in the examination of Mr. Mitchel for the purpose of impeaching him through his deposition. This Specification of Error is completely without foundation. Counsel for plaintiffs stated that he wished to read pages 47 to 51 of the Mitchel deposition [Tr. 3415]. After some colloquy the Court permitted plaintiffs’

counsel to read the portion of the deposition as requested and other portions [Tr. 3420]. Counsel then read the portions indicated [Tr. 3421-3427]. Parenthetically, it should be noted that Mr. Mitchel was not impeached.

Conclusion.

For the foregoing reasons we respectfully submit that the Judgment for Appellees, The Maytag Company and Maytag West Coast Company, should be affirmed.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK R. JOHNSTON

No. 20770

In the

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation;
RADIO CORPORATION OF AMERICA, a Delaware corporation;
WHIRLPOOL CORPORATION, a Delaware corporation;
MAYTAG COMPANY, a Delaware corporation;
MAYTAG WEST COAST COMPANY, a California corporation;
GENERAL MOTORS CORPORATION, a Delaware corporation;
FRIGIDAIRE SALES CORPORATION, a Delaware corporation;
NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

Brief for Appellees General Motors Corporation and Frigidaire Sales Corporation

On Appeal from the United States District Court
for the Northern District of California

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In the
United States Court of Appeals
For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation;
MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation;
BORG-WARNER CORPORATION, an Illinois corporation;
CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation;
RADIO CORPORATION OF AMERICA, a Delaware corporation;
WHIRLPOOL CORPORATION, a Delaware corporation;
MAYTAG COMPANY, a Delaware corporation;
MAYTAG WEST COAST COMPANY, a California corporation;
GENERAL MOTORS CORPORATION, a Delaware corporation;
FRIGIDAIRE SALES CORPORATION, a Delaware corporation;
NORGE SALES CORPORATION, an Indiana corporation,

Appellees,

and

BROADWAY-HALE STORES, INC., a California corporation,

Defendant.

**Brief for Appellees General Motors Corporation
and Frigidaire Sales Corporation**

On Appeal from the United States District Court
for the Northern District of California

OPINION OF TRIAL COURT

The memorandum opinion and order of the United States District Court granting the motions of all appellees for directed verdicts and for dismissal of the complaints appear in the Clerk's

Transcript of Record at R. 1912-1976.¹ The memorandum opinion has also been reprinted in *United Shoppers Exclusive v. Broadway-Hale Stores, Inc., et al.*, 1966 Trade Cas. 82,265 (N.D. Calif. 1965).

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of California, dated November 24, 1965, dismissing two consolidated actions (R. 1977). The judgment appealed from was entered upon the order of the court granting the motions of all defendants, including General Motors Corporation (hereinafter referred to as "General Motors") and Frigidaire Sales Corporation (hereinafter referred to as "Frigidaire"), for directed verdicts and for dismissal of the complaints made at the conclusion of plaintiffs' evidence on the issue of liability (R. 1912-1976).

Jurisdiction of the District Court was invoked by plaintiffs pursuant to the provisions of 15 U.S.C. §§ 15 and 26 on account of alleged violations of the Sherman Act, 15 U.S.C. §§ 1 and 2. This Court has jurisdiction of the appeal, but only as an appeal from the final judgment, pursuant to 28 U.S.C. § 1291.

Upon appellants' motion, and subsequent to the docketing of this appeal, this Court dismissed Broadway-Hale Stores, Inc., as an appellee.

STATEMENT OF THE CASE

This appeal is essentially a simple one, complicated only because appellants created a voluminous record in the trial court. The appeal follows an unsuccessful attempt by appellants to weave the fabric of an imagined conspiratorial boycott out of a mass of unrelated documents and unfavorable testimony. Appellants sought to establish the theory that appellees had acted in concert to deprive appellant Manfree, Inc. of television sets and major household appliances during the period from 1957 to 1964.

1. We have adopted throughout this brief the same references used by appellants. Thus, references to the Clerk's Transcript of Record will be "R.", and the transcript of the trial proceedings "Tr." Transcripts of the pretrial hearings are referred to as "P. Tr."

Throughout the pretrial proceedings and the trial, appellants struggled unsuccessfully to find some reasonable explanation as to *why* the appellees would have chosen to conspire to boycott Manfree. Appellants advanced the suggestion that there had been a conspiracy to maintain suggested retail prices and to require retailers in the San Francisco area to tag, advertise and sell at those suggested prices. However, the facts showed that some appellees and alleged co-conspirators did not even have suggested retail prices, and that in instances where wholesalers furnished such suggested prices to their retailers, the prices were largely ignored in tagging, advertising and selling. Indeed, as we shall demonstrate, appellee Frigidaire abandoned the promulgation of suggested prices in 1960 for the very reason that retailers had paid no attention to such prices. Appellants also put forward the argument that appellees conspired to refuse to sell to "discount houses" in the San Francisco area. Again the facts were to the contrary and failed even to disclose similarity of action. The merchandise of a number of appellees was carried by concerns in the San Francisco area which characterized themselves as "discount houses," and many, if not all, other San Francisco retailers who carried appellees' merchandise advertised and sold at "discounts." Appellants additionally argued that there was a conspiracy to favor Broadway-Hale and four other retailers in the San Francisco area, and that this somehow had the effect of excluding appellants. Again, the facts were at odds with appellants' argument. There turned out to be no significant pattern at all to the dealings (if any) between appellees and the five retailers, and no connection between such dealings and any decisions by appellees as to whether or not to sell to Manfree. As we shall demonstrate, appellee Frigidaire terminated its franchise arrangements with Broadway-Hale and two of the other retailers during the same time period in which it decided not to franchise Manfree.

Ultimately, appellants produced no evidence of any conspiracy to boycott appellants or to do anything. The trial witnesses emphatically denied the existence of any agreement or conspiracy.

In instances where appellees declined to sell to appellant Manfree, the evidence showed affirmatively that they had good business reasons, and in fact made their decisions unilaterally without communicating with one another and without any knowledge of each others' plans or intentions. There was no circumstantial evidence of conspiracy, nor even any evidence of "parallelism." On the contrary, the only pattern of conduct disclosed by the evidence was one of disparateness.

A. The Significant Facts.

Appellant United Shoppers Exclusive ("U.S.E.") is a self-styled "discount" department store which, during the period 1957 to 1964, was located on Alemany Boulevard in San Francisco. U.S.E. generally did not itself engage in the purchase or sale of merchandise; rather it leased different areas of the store to concessionaires who conducted various types of retail business. One such lessee-concessionaire was appellant Manfree, Inc. ("Manfree"), which was in the business of selling television sets and major household appliances.

The appellees comprise six manufacturers of household appliances or television sets and three wholesale distributors of such merchandise.²

2. Among the manufacturer appellees, General Electric manufactures both appliances and television sets, RCA manufactures only television sets, and Maytag, Whirlpool, Borg-Warner and General Motors manufacture only appliances. The wholesale distributor appellees are Maytag West Coast which distributes Maytag appliances, California Electric Supply, which up until 1963 distributed Philco appliances and television sets and Frigidaire Sales Corporation which distributes Frigidaire appliances manufactured by General Motors. Norge Sales, another appellee dismissed on summary judgment, distributed Norge appliances through local independent distributors. A defendant at the trial, Broadway-Hale, was a retail seller of appliances, television and other merchandise. Broadway-Hale was dismissed by appellants during the pendency of this appeal. In addition, at the commencement of these cases, appellants named as defendants a number of other companies engaged in the manufacture or wholesale distribution of appliances or television, as well as certain retailers of such merchandise; all these other defendants were dismissed prior to trial.

1. CONTACTS BETWEEN APPELLANTS AND APPELLEES.

Appellants had little, if any, contact with most of the appellees. The six manufacturer appellees (with the exception of General Electric as to its "General Electric" brand merchandise) sold only to wholesale distributors rather than to retailers. As for the distributor appellees, Frigidaire was first asked for a dealer franchise by appellant Manfree shortly before appellants filed suit, and Maytag West Coast and California Electric Supply each dealt with Manfree for awhile and then—at different times and for different reasons—elected to cease selling to Manfree.³ For a time Manfree carried the Norge and Hotpoint lines of appliances which it purchased from independent local distributors (Tr. 2378; 3053; 3068). In addition, Manfree carried a variety of other major appliance and television lines not manufactured or distributed by any of the appellees⁴ (Tr. 5640-5642; 5713-5715).

In those instances in which a particular appellee was in a position to sell to Manfree but elected not to do so (or decided to discontinue selling), that appellee had its own independent business reasons for not selling. The principal reason expressed by several witnesses at the trial was that Manfree simply did not appear to be capable of doing a good job selling appliances and television, had inadequate display space and untrained and inept personnel (Tr. 3270-3271; 4191-4194; 5639-5640). One distributor whose appliance line had been carried by Manfree considered that the Manfree sales people were not aware of the selling points of the line and exhibited no interest in learning (Tr. 3376-3378). Another distributor took exception to the misleading "bait and switch" advertising that appellants used back in 1957-1959, advertising brands of appliances and television

3. Maytag West Coast commenced selling to Manfree in January of 1958 (Pl. Ex. No. 1523); its franchise with Manfree expired of its own terms in March of 1959 (Maytag Ex. No. 13143; Tr. 3375). California Electric Supply sold the Philco line to Manfree from approximately May 10, 1957 to September 12, 1958 (Tr. 3936-3938).

4. The predecessor concessionaire of Manfree also had carried many appliance and television lines, including several manufactured or distributed by appellees (Tr. 5711-5712).

that Manfree had no intention of selling to customers (Tr. 2867-2869). At least one distributor considered it undesirable that U.S.E. was a "closed door" store which was closed to the general public and restricted solely to members of certain trade groups⁵ who had purchased a membership card for \$2.00 (Tr. 4320).⁶ Another distributor complained about the drinking habits of the Manfree employee in charge of the major appliance section of the store (Tr. 3376-3379).⁷ In short, there was a variety of reasons why Manfree did not represent a particularly attractive dealer outlet and why certain of the distributors could and did reach unilateral business decisions not to sell to Manfree.

Manfree, of course, purported to sell at "discount prices" but this was not a significant factor to any of the appellee distributors in deciding not to sell to Manfree. Many, if not all, sellers of appliances and television sets in San Francisco sold at "discounts" (e.g., Tr. 1536; 3288; 3333; 4085-4092; 5029; 5646) and indeed other self-styled "discount stores" in San Francisco were able to secure major brand merchandise.⁸

2. CONTACTS BETWEEN APPELLANTS AND GENERAL MOTORS AND FRIGIDAIRE.

Appellee General Motors Corporation manufactures Frigidaire appliances. However, it does not sell them to retailers; this function is performed by appellee Frigidaire Sales Corporation, a

5. That is, Government employees, veterans and members of labor unions (Tr. 5707-5708; 6201-6202).

6. Over a year *after* filing suit U.S.E. abandoned its "closed door" policy (Pl. Ex. No. 497).

7. One of Manfree's officers who testified at trial, Mr. Boyd, acknowledged that Manfree had received complaints about the employee (Tr. 5655-5656). Manfree management at first shrugged off the complaints (Tr. 3378). The employee later was terminated for showing up drunk on the job (Tr. 5656).

8. Thus the concessionaire at GET, another so-called "discount store," handled many of the lines involved in this case, including Norge (Tr. 2895), Hotpoint (Tr. 6073-6074; 3185-3186) and Westinghouse (Tr. 6169). GET never expressed an interest in carrying the Frigidaire line (Tr. 4042-4043; 4049-4050).

wholly owned subsidiary of General Motors. The only contact between appellants and General Motors was that in July, 1960, shortly before filing suit, appellants sent a letter to General Motors asserting that they wished to purchase Frigidaire appliances (Pl. Ex. No. 492; Tr. 4080-4085). The letter was promptly forwarded to the Frigidaire Sales Corporation office in the Bay Area (Tr. 4228-4229; Pl. Ex. No. 493-494).

Until receipt of the July, 1960 letter, Frigidaire had been unaware that Manfree had any desire to sell Frigidaire appliances.⁹ A few days after receipt of the letter, the Frigidaire sales representative covering the San Francisco territory visited U.S.E. and concluded that the Manfree appliance department was small, unattractive and had no particular appeal as a potential Frigidaire dealership (Tr. 4317-4321). Frigidaire decided not to franchise Manfree at that time (Tr. 4039-4041).

Appellants filed suit a couple of weeks later (Tr. 4222-4223). The filing of the suit, of course, made Frigidaire even less enthusiastic about taking Manfree on as a dealer¹⁰ (Tr. 4084-4085).

The Frigidaire witnesses testified that their decision not to franchise Manfree was made independently without any agreement or any discussion with any other distributor or manufacturer or any retailer (Tr. 4283; 4321). There was no evidence from

9. Prior to 1960, Frigidaire had only two contacts with appellants, both of a routine nature, when the Frigidaire sales personnel were conducting a survey of appliance outlets (Pl. Ex. No. 487). There was no evidence that any request to purchase Frigidaire merchandise was made by appellants at those times (Tr. 4083; 4222; 4281; 4309). Appellants misstate at page 49 of their Opening Brief that "representatives of appellee Frigidaire had visited Manfree in 1957 and were asked for a franchise," citing the testimony of Bernard Freeman, an officer of Manfree, at Tr. 5825-5829. But Freeman testified that he had no recollection of any conversation with the Frigidaire salesman in 1957 or at a later date other than simply being introduced to him (Tr. 5825). It perhaps is typical of appellants' use of the record in this case that they would characterize a personal introduction as—instead—a request for a franchise.

10. The record shows only one further contact between appellants and General Motors and Frigidaire. Appellants directed a second round of letters to General Motors and Frigidaire in September of 1961—after the litigation was well underway—asking to purchase merchandise (Tr. 4235-4240; Pl. Ex. Nos. 496-497; 4270).

any other witness or in any document that Frigidaire in fact did discuss the question of franchising Manfree with anyone else or that Frigidaire was even aware of the decisions made by any other distributors with respect to selling (or not selling) to Manfree (Tr. 4284).

Frigidaire was highly selective in choosing its dealers (Tr. 4072; 4318-4319). During the period involved in these suits, Frigidaire moved to reduce the number of dealers it had in San Francisco in the hope of obtaining a stronger, more loyal dealer organization and in this connection terminated, prior to 1960, the franchises of Broadway-Hale, Macy's and Lachman Bros. (Tr. 4073-4078)—who, of course, were three of the five San Francisco retailers who appellants claim were part of the alleged conspiracy to boycott appellants.

3. PRACTICES FOLLOWED WITH RESPECT TO PRICING AND ADVERTISING.

For a good many years it has been common in many fields of commerce for the manufacturers or distributors of consumer goods to disseminate to their retail dealers "suggested list prices." These may or may not be used as a guideline by the retailer in selling to the consumer. Likewise, there has been the frequent custom in consumer goods fields for manufacturers or distributors to give advertising allowances to retail dealers.

In the present case there was voluminous evidence regarding the giving of advertising allowances and the dissemination of suggested list prices in the television and appliance fields. The practices followed by appellees varied substantially from time to time and from appellee to appellee. (*E.g.*, compare Tr. 5066 with Tr. 3985-3986.)

Some (but not all) of the appellee manufacturers furnished lists of suggested retail prices to their wholesale distributors. In some instances distributors in turn passed these suggested price lists on to their dealers; in other instances distributors constructed their *own* lists of suggested retail prices and furnished them to dealers (*e.g.*, Tr. 857; 1725; 2828-2831; 3474-3475; 5173). None of the manufacturer appellees issuing list prices concerned them-

selves with whether their distributors had forwarded the lists to retailers (*e.g.*, Tr. 3475; 4542) or whether retailers followed these prices (*e.g.*, Tr. 5174). Some manufacturers or distributors—including Frigidaire from 1960 on and General Electric (as to Hot-point) from 1958 on—chose not to suggest any retail prices¹¹ (Tr. 3278; 4208-4209).

In those instances where suggested retail price lists were furnished, retailers ignored these guidelines frequently and with impunity (Tr. 647-650; 1178; 1184; 1526-1527; 1606-1608; 2226-2230; 5646; 5648-5649).¹² Indeed, the retailers, including Broadway-Hale, engaged in frequent advertising, tagging and selling of appliances and television sets below suggested list prices (Tr. 901; 1431-1433; 1450; 1515-1516; 2352-2353; 3289; 4085-4086). One of appellants' own officers characterized Broadway-Hale as one of the "biggest discounters" in San Francisco (Tr. 5646).

In one form or another all distributors offered advertising allowances to their dealers but here again the practices varied from time to time and from distributor to distributor. Contrary to the assertion at pp. 32-39 of Appellants' Opening Brief, there was no uniform practice of granting advertising allowances only where the retail advertising followed suggested list prices. For example, appellees Maytag West Coast and General Electric were shown to have given advertising allowances to dealers in numerous instances for below-list advertising (Tr. 3383-3403; 1431-1432; 1996-2000; 4398). In the case of Frigidaire, the type of price advertising done by a dealer had no bearing whatsoever on whether Frigidaire would give him an advertising allowance (Tr. 1315-1317; 4085-4092; 751).¹³ And commencing in 1960 with its 1961 models, Frigidaire ceased disseminating suggested retail list prices, prin-

11. Another manufacturer of appliances, Westinghouse, dropped the practice of publishing suggested list prices in 1960 or 1961 (Tr. 6165).

12. The retailers' practices varied from one retailer to another (Tr. 4086) and from one line of merchandise to another (Tr. 1892-1893; 1980). Of course, as we shall demonstrate below, the circumstance that a retailer may have elected to follow suggested retail prices, without more, does not rise to a level of proscribed activity.

13. In their effort to argue to the contrary, appellants point to evidence that has nothing to do with the matter at hand. At pp. 34-35 of their

cipally for the reason that such suggested list prices as Frigidaire had previously promulgated were largely ignored (Tr. 4085-4092). Of course, as before, Frigidaire continued to extend advertising allowances to its dealers (Tr. 4088).

4. DEALINGS BETWEEN APPELLEES AND THE FIVE ALLEGED RETAIL CO-CONSPIRATORS.

Appellants claim that five retailers (Broadway-Hale, Macy's, Redlick-Newman, Lachman Bros. and Sterling Furniture Company) were members of the alleged conspiracy to boycott appellants. Broadway-Hale and the other four retailers were among the best known and most successful San Francisco retailers of television sets and household appliances.¹⁴ At various times all five retailers carried lines of merchandise manufactured or distributed by one or another of the appellees; likewise the retailers on occasion received advertising allowances from some of the appellees.

Beyond these generalities the dealings between appellees and the five retailers—to the extent there were any dealings at all—resemble a crazy-quilt. Thus Frigidaire at various times dealt with all five of the retailers.¹⁵ However, Frigidaire cut off both Broad-

Opening Brief, appellants quote from a Frigidaire advertising manual dating back prior to the period involved in the suit (Pl. Ex. No. 338). The portion quoted from pp. 1 and 2 of the old manual simply sets forth a formula for calculating advertising allowances to dealers based on their purchases from Frigidaire—irrespective of the actual prices at which the dealers advertised or sold their products. The portion quoted by appellants from p. 6 of the manual does deal with the use of suggested prices in advertising but clearly on its face this relates only to advertising run nationally or locally *by Frigidaire itself* listing the names of its local dealers, and has nothing to do with advertising run by dealers themselves.

14. Each had large, attractive stores, were well established in the business, had branch stores in surrounding communities (Tr. 147; 1534; 1797; 2446-2447; 6360-6361), and sold substantial quantities of appliances. However, during the period involved in these suits, Sterling Furniture closed all its stores except one located outside of San Francisco (Tr. 119), which was acquired in 1963 by Macy's (Tr. 2446-2447). Broadway-Hale drastically curtailed its retail operations (Tr. 28; 1527) and went out of the appliance business in San Francisco in 1963 (Tr. 1527).

15. It should be noted that a large percentage of Frigidaire's sales in San Francisco were to dealers other than Broadway-Hale and the alleged co-conspirators (Pl. Ex. No. 160 B).

way-Hale¹⁶ and Macy's as dealers in 1959 (prior to the time that appellant Manfree asked Frigidaire for a franchise) and never took them back on, cancelled Lachman Bros. in 1958 and refranchised the latter at the end of 1960 (Tr. 4074-4079) and lost Sterling as a San Francisco dealer in 1961 when that company closed its last remaining San Francisco store (Tr. 4077; see also Frigidaire Ex. No. 14003).

Such dealings as there were between other appellees and the five retailers were similarly of a sporadic nature. As an example, Redlick's was the only one of the retailers who was a Frigidaire dealer during the entire period in these suits. However, during that period appellee Maytag West Coast sold to Redlick's only in the years 1958 and 1959 (Pl. Ex. No. 641). Redlick's never did purchase appliances or television sets from alleged co-conspirator Westinghouse¹⁷ (Tr. 6165). Redlick's handled the General Electric line for awhile, but its General Electric dealership was cancelled in 1959; Redlick's never obtained a franchise for the Hotpoint line (Tr. 2263-2264).

During such times as they were franchised dealers for particular lines of television sets or household appliances, the five retailers did obtain various types of advertising allowances from the distributors of those lines. There was a great diversity in the advertising programs of one distributor as compared with those of another distributor. In the case of Frigidaire, its advertising allowances were available to its dealers on a nondiscriminatory basis (Tr. 751; 3984-3988; 4088-4092).

5. AHLMA, NEMA, EIA AND THE SAN FRANCISCO BETTER BUSINESS BUREAU.

There were no contacts or communications—direct or indirect—between the distributor appellees (or between the manufac-

16. Frigidaire terminated its franchise with Broadway-Hale on account of a dispute over Frigidaire's one-year warranty provision for its appliances. Broadway-Hale was unwilling to honor the warranty for more than a 90-day period (Tr. 4074-4075; 4241; Frigidaire Ex. No. 14004).

17. That is, throughout the period from 1957 through 1963.

turer appellees) with respect to dealings with Manfree or U.S.E. or any other matters of concern in these actions. In an effort to obscure this fatal defect in their claim of conspiracy, appellants introduced evidence relating to various associations, such as the American Home Laundry Manufacturers Association (AHLMA), the National Electrical Manufacturers Association (NEMA), the Electronic Industries Association (EIA) and the San Francisco Better Business Bureau on the theory that membership in such organizations had sinister implications.

Some of the manufacturing appellees belonged to NEMA or AHLMA or EIA. Frigidaire belonged to NEMA and AHLMA but not EIA (Pl. Ex. for Id. No. 3011). The five alleged retail co-conspirators belonged to the San Francisco Better Business Bureau.¹⁸ Neither Frigidaire nor General Motors was a member or attended any meetings of the BBB (Tr. 1754).

The evidence introduced or offered¹⁹ as to NEMA and AHLMA showed that the activities and meetings of those organizations concerned nothing except such matters as product specifications (*e.g.*, Pl. Ex. for Id. No. 3007), a rather general code for ethical and nonmisleading advertising (Pl. Ex. No. 2) and reports on industry sales (*e.g.*, Pl. Ex. for Id. Nos. 2099, 3000-3005).²⁰ Sim-

18. Appellant U.S.E. itself was a member of the Better Business Bureau for a period of time (Tr. 6054), as of course were literally hundreds of other local retailers.

19. Some of the voluminous evidence offered by appellants regarding NEMA, AHLMA, EIA and the San Francisco Better Business Bureau was rejected by the trial court as hearsay, cumulative or irrelevant. See part V(A)(4) of this brief, *infra*. Nevertheless, throughout their Opening Brief, in discussing the alleged "facts," appellants refer to this and other excluded evidence without distinguishing between that which was admitted and that which was excluded.

20. Appellants attach as Appendix B to their brief a letter over the rubber-stamped name of Judson Sayre, president of Norge Sales Corporation (Pl. Ex. for Id. No. 431). The letter has attached to it a memorandum by an unidentified author. The "Sayre" letter states that the memorandum was passed out at a NEMA meeting. Appellants several times assert, with gross inaccuracy, that this memorandum is evidence that appellees were working together to enforce retail price policies (see Appellants' Opening Brief, pp. 72-73, 82, 141-142). There was no evidence that Judson Sayre in fact wrote or sent the letter, no evidence as to who had written the memo-

ilarly, the evidence as to the San Francisco Better Business Bureau showed nothing more than that many retailers were members and that at one time there were meetings—in cooperation with a representative of the State of California—to consider the promulgation of a code of advertising standards (Tr. 1576; 2317-2322).²¹

6. DEALINGS BETWEEN APPELLANTS AND THE SAN FRANCISCO NEWS-PAPERS.

For a period of time the two morning newspapers then published in San Francisco—the San Francisco Examiner and the San Francisco Chronicle—declined to accept advertising from U.S.E.²² The San Francisco Examiner had the policy of not carrying advertising of “closed door stores,” such as U.S.E., where the general public was excluded, and where persons responding to the advertising thus might go out to the store and not be permitted to buy the advertised merchandise (Tr. 2094). The San Francisco Chronicle’s policy was to turn down advertisers who charged a fee to persons wishing to shop there, and where again a prospective customer responding to an advertisement might find to his annoyance he had to pay a fee to get into the store (Tr. 2104-2105). After U.S.E. dropped its “closed door” mem-

randum and no evidence that the memorandum in fact was distributed at a NEMA meeting or that Frigidaire, General Motors or any other appellee had ever received it. In short, there was no foundation for admissibility of the letter against anyone. In any event, the memorandum—contrary to appellants’ assertions—has nothing to do with retail prices. The memorandum does mention *wholesale* prices, but on this subject merely sets forth the unidentified writer’s opinion that manufacturers and wholesalers of major appliances should not give discriminatory discounts to large-volume retail accounts.

21. The code (Pl. Ex. No. 391) established a voluntary “Standards of Practice” for the San Francisco home furnishings industry. The code dealt with such straightforward topics as unfair competitive claims, misleading advertising layouts, “bait” advertising, prize contests and description of merchandise. The code also spelled out the instances in which certain phrases may be utilized in advertising. The sole reference to “comparative prices” merely specified that “factual proof of a comparative price shall be in possession of the advertiser at the time of its publication.”

22. Both newspapers were claimed by appellants to be members of the alleged conspiracy directed against appellants (R. 1914).

bership fee policy in 1961, it was able to advertise in both newspapers (Tr. 2156-2159). At all times before and after 1961 U.S.E. was able to advertise in the evening newspaper, the then San Francisco Call-Bulletin (Tr. 2167-2168).

The policies of the Examiner and the Chronicle as to accepting advertising were of long standing and were applied as a matter of independent business decision (*e.g.*, Tr. 2094). Neither Frigidaire nor any other appellee ever discussed these policies with the newspapers or anyone else (Tr. 4080; 4092) nor was there any evidence that any appellee knew what the policies were or even knew that U.S.E. had any difficulty placing its advertising in any newspapers.

B. Proceedings in the Trial Court.

Appellants' original complaint (R. 1) was filed on August 12, 1960, naming as defendants the appellees, as well as numerous other manufacturers and distributors and five retailers, and alleging that they conspired to boycott appellants. On August 4, 1964, appellants filed their complaint in a second suit (R. 15), making essentially the same claims as in the first suit but updating the period of alleged damages. The two suits were consolidated for trial (R. 1608).

Appellants conducted broad-ranging pretrial discovery, taking dozens of depositions and launching numerous sets of interrogatories and motions to produce. The court held extensive pretrial conferences. The parties were required to prepare pretrial statements and the court framed comprehensive pretrial orders (R. 1431-1478; 1608-1609), which, among other things, defined the basic claims to be tried as follows:

- "a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?
- "b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and

major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

A supplementary pretrial order established the order of proof for the trial: Appellants were first to present their evidence on liability prior to reaching the question of the extent (if any) of damages (R. 1608-1609). Under the pretrial procedure established by the court, the parties were required to and did identify their witnesses and proposed exhibits prior to trial (R. 1470-1472).

Trial commenced on September 1, 1965 and continued for some 37 trial days. There was testimony from 51 witnesses (including deposition testimony that was read) and over 500 documents were received in evidence.

At the conclusion of appellants' evidence on the question of liability, appellees moved for directed verdicts and to dismiss. The parties submitted briefs and the court heard full argument on the motions. The court concluded that appellants had failed utterly to present evidence from which any reasonable inference of any conspiracy could be drawn, and that the actions should be dismissed (R. 1912-1976). Judgments were entered on November 26, 1965 (R. 1977). The present appeal followed.

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

Although appellants purport to specify many points on appeal (for example, see appellants' 63-page Specification of Errors) and advance numerous contentions, the basic questions on this appeal may be succinctly stated: (1) whether the pretrial rulings that were made regarding pretrial discovery, the conspiracy issues to be tried and the separation of trial on the issues of liability and damages, were erroneous and caused substantial prejudice to appellants; (2) whether appellants made out a prima facie case of conspiracy; (3) whether certain items of evidence were improperly excluded with prejudicial effect on appellants' case; and (4) whether costs were properly taxed.

The argument of appellees General Motors and Frigidaire in summary is:

(1) The pretrial rulings were correct. Appellants had abundant pretrial discovery and such limitations as were imposed on appellants' discovery were proper and inconsequential in any event. The court's pretrial definition of the conspiracy issues to be tried was correct and did not result in any prejudice to appellants. The court's order separating the issues of liability and damages for trial likewise was proper, had no impact upon the outcome, but did permit bringing the matter to a conclusion without further lengthy and futile proceedings.

(2) The evidence wholly failed to support any reasonable inference that Frigidaire or General Motors, or any other appellee, conspired in violation of the Sherman Act. On the contrary, the evidence showed appellees acting independently and disparately, and conclusively disproved the existence of any conspiracy.

(3) The trial court's rulings on evidence were sound in law and within the proper exercise of the court's discretion. Appellants were accorded every reasonable opportunity to prove a case.

(4) The court in its discretion properly allowed certain items of costs to appellees.

ARGUMENT

I. Appellants Were Allowed Extraordinarily Full and Virtually Unlimited Pretrial Discovery Against Frigidaire and the Other Appellees; Such Limits as Were Imposed Were Perfectly Proper.

Amidst appellants' grab bag of assorted claims of error is the claim that appellants somehow were not permitted full and complete pretrial discovery. Appellants are none too clear about what discovery actually was denied them (see Appellants' Opening Brief, pp. 172-177), and, as shall be demonstrated, they do not accurately describe the record in this regard. But in any event, appellants were permitted extraordinarily full discovery; such few limitations as the trial court imposed were proper and within the court's discretion.

Appellants voice only three specific grievances over the pre-trial discovery rulings of the trial court relating to Frigidaire or General Motors. None of the grievances has the slightest merit.

A. SO-CALLED "INTRA-COMPANY" MEMORANDA.

Appellants served one of Frigidaire's salesmen, Mr. John Shaw, with a subpoena duces tecum in connection with notice of his deposition. The subpoena was served despite an earlier court ruling in this case that subpoenas under Federal Rule of Civil Procedure 45 are not the proper means to obtain production of documents by a party, without a prior showing of good cause as required by Rule 34 (R. 362-364). Frigidaire agreed to comply with substantially all of the items demanded in the subpoena. These documents were turned over at the deposition of Mr. Shaw on June 12, 1963. Nevertheless, appellants moved for production—still without a showing of good cause as required by Rule 34—of any salesmen's reports pertaining to any conference with any defendant retailer or plaintiffs. The trial court ruled that Frigidaire should produce documents of this character within the guidelines of an earlier production order entered in this case (R. 419-421). Frigidaire did so.

Appellants persisted, however, to importune Frigidaire (and other defendants) for further similar reports and for any written reports or statements of conversations between Frigidaire personnel and any other persons on the acquisition, sale or advertising of television sets or major household appliances by appellants or the retail stores who at that time were defendants to the action (R. 422-425; 745-752; 625-626). Frigidaire pointed out repeatedly that *all such statements or reports had been produced to appellants*, and that it knew of no others (R. 648-649).²³ Appellants never demonstrated the contrary, nor do they even attempt to do so now.

23. See also Frigidaire's Answer to Plaintiff's Second Set of Interrogatories (R. 803-804).

B. STATEMENTS OR REPORTS OF CONVERSATIONS.

Appellants also complain, at pp. 174-175 of their brief, that they were denied answers to certain interrogatories requesting information as to statements or reports of conversations concerning the purchase, sale or advertising of television sets or major appliances by appellants or the retail defendants (R. 625). Appellants are mistaken. Frigidaire in fact *did* answer the interrogatories, stating that it had previously searched for documents of the nature described and that *all such documents had been produced* (R. 648-649; 803-806).

C. CERTAIN CORRESPONDENCE.

Finally, at pp. 175-177, appellants claim error in certain rulings of the trial court relating to production by the factory (*i.e.*, manufacturing) defendants of various categories of reports and correspondence. Only a few of these challenged rulings involve General Motors (R. 615-616; 977-979). As for item 15 of appellants' motion to produce, filed June 5, 1964 (R. 422, 425) and items 20, 22(c), (d), (e) of plaintiffs' motion to produce filed November 17, 1964 (R. 745; 749-750), General Motors responded that, to the best of its knowledge, it had produced all documents called for by these items (R. 546; 886; 888). Item 27(f) of the November, 1964, motion asked for correspondence relating to any discussions of discount stores at trade association meetings. Appellants made no effort to show that General Motors possessed these documents, or that they had any relevancy to the case. General Motors opposed the motion, arguing that it was a belated effort by appellants which would have required a new and unlimited file search²⁴ (R. 878; 890). In the exercise of its discretion, the trial court agreed with the General Motors position (R. 979).

Federal Rule of Civil Procedure Rule 34 vests in the District Court wide discretion whether production or inspection of docu-

24. Appellants had ignored an order of the trial court to have their final motions to produce on file, in Action No. 39336, by July 24, 1964 (R. 879).

ments should be granted. 2A Barron & Holtzoff, Federal Practice & Procedure Section 803 (1961). Discovery is not a matter of unlimited right. On appeal, a trial court's disposition of matters of discovery should be upheld unless the ruling was improvident and affected the substantial rights of the parties. *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 57 (9th Cir. 1961); *Roebeling v. Anderson*, 257 F.2d 615 (D.C. Cir. 1958). Appellants fail to demonstrate that the trial court's rulings on discovery were improvident, nor do appellants show that the few minor discovery rulings against appellants could have had any prejudicial effect upon their case.

II. The Trial Court's Pretrial Order Defining the Nature of the Conspiracy Question Here to Be Tried Was Proper and in Any Event Had No Prejudicial Limiting Effect Upon the Proof at Trial or Upon the Trial Court's Consideration of Appellants' Evidence in Ruling on the Motions for Directed Verdict.

At pp. 130-133 of their Opening Brief, appellants claim error in the pretrial order of the court entered on August 17, 1965 (R. 1608-1609) which established that the basic liability issue to be tried in these cases was whether there had been a conspiracy between the retailer, distributor and manufacturer defendants which violated §§ 1 and 2 of the Sherman Act and resulted in damage to appellants.²⁵ Appellants complain that the order improperly prevented them from proving the existence of a series of separate—and presumably disconnected—conspiracies, each involving an alleged conspiratorial team comprising a manufacturer, its distributor and the retailers carrying that specific line of merchandise. We submit that the pretrial order was proper and, as applied with practi-

25. Appellants incorrectly characterize the order as allowing proof only of a "horizontal" conspiracy (Appellants' Opening Brief, p. 130). However, the order explicitly permitted appellants to attempt to prove a conspiracy on all three levels of distribution. Indeed, the defendants who went to trial and the alleged co-conspirators, who were the subject of much of appellants' evidence, included companies on all three levels.

Appellants also mistakenly refer to the pretrial order as dated August 13, 1960. See Appellants' Opening Brief, p. 130. The pretrial order, of course, was not entered until less than a month before trial. Appellants were deprived of no discovery on account of this articulation of the issues.

cality at the trial, in fact did not preclude the admission of any evidence nor in any way circumscribe the consideration of any of appellants' contentions. On the contrary, at the conclusion of appellants' evidence, the trial court carefully scanned the record for evidence of any conspiracy, vertical, horizontal or otherwise, and found no reasonable inference of any.

The rationale for the pretrial order lay in the clear necessity, in protracted antitrust cases of this nature, to insert a semblance of guidelines to keep the trial within reasonable bounds (P. Tr. of May 28, 1965, page 53, lines 14-18). Wide discretion is ordinarily vested in a trial court in adapting a complex case into manageable shape for trial. *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y.), *petition for mandamus denied*, 309 F.2d 242 (2d Cir. 1962). Moreover, the court was clearly free to disregard the pretrial order, if necessary, to modify the legal issues as the trial progressed, if appellants had made any point of the matter. *Cf. Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 226 (D. Colo. 1963). Appellants, however, did not choose to do so.

Here the trial court's order merely articulated concisely the issues framed by appellants' own complaints (R. 1, 15).²⁶ There was nothing in the complaints that apprised appellees of the "vertical" conspiracy theory of appellants.²⁷ Not until mid-1965, on the eve

26. Thus, the complaints asserted a conspiracy between the defendants to violate Sections 1 and 2 of the Sherman Act "by contracting, combining, conspiring together and each with the other, and with other co-conspirators, in restraint and monopoly of such trade and commerce. . . ." See R. 8, Complaint, Action No. 39336, p. 7, particularly lines 21-23; R. 21, Complaint, Action No. 42674, p. 7, particularly lines 5-7.

27. Paragraphs 7(a) and 7(b) of the complaint, invoked by appellants, are immediately preceded by the allegation, "defendants, in combination and conspiracy in restraint of such interstate trade and commerce, have and continue to do the following things pursuant to and in furtherance of the said combination and conspiracy:" (R. 9, Complaint, Action No. 39336, p. 8, ll. 4-8; R. 21, Complaint, Action No. 42674, p. 7, ll. 19-22.)

Appellants also refer to paragraph 10 of the complaint. However, paragraph 11 in each action expressly provided "each of the defendants have combined and conspired each with the other, to do and perform each of the acts alleged in paragraph 10." (R. 11-12, Complaint, Action No.

of trial, did appellants belatedly attempt to introduce into the trial what *appeared* to be separate and distinct charges of nine separate and presumably unrelated vertical conspiracies, involving what then *appeared* to be different evidence. Had appellees been suitably forewarned, they at least would have been able to move for a separate statement of claims (Federal Rules of Civil Procedure, Rule 10) and for severance (Rules 20(b), 21 and 42(b)).

The potential prejudice to appellees was aggravated by the nature of appellants' case, with its mass of evidence and numerous defendants and alleged co-conspirators as well as the potential unfairness of a mass trial involving so many various charges. *Krulewitch v. United States*, 336 U.S. 440, 446-447 (1949) (concurring opinion); *Kotteakos v. United States*, 328 U.S. 750, 772-773 (1946).

But even if there had been error in the pretrial order—which there was not—appellants were not prejudiced in the least. Notwithstanding the pretrial order, throughout the trial appellants were allowed to introduce evidence in support of any theory of alleged conspiracy, whether denominated horizontal or vertical. There was no instance during the trial—and none is now cited by appellants—in which evidence was excluded on the authority of the August 13, 1965 Pretrial Order.

In connection with the delineation of the trial issues at the pretrial conference, appellants filed an Offer of Proof specifying the evidence they intended to offer in support of their newly conceived vertical conspiracy argument (R. 1481). As the record demonstrates, virtually every one of the many items specified were offered in evidence by appellants at the trial and almost all were received.²⁸ The relatively few items excluded were ruled inadmissible because they were hearsay or not properly authenticated or

39336, p. 10, l. 31 to p. 11, l. 1; R. 24, Complaint, Action No. 42674, p. 10, ll. 11-13.)

28. However, the hopes and expectations expressed by appellants in their Offer of Proof were not fulfilled: the evidence did not prove what appellants said it would prove and the witnesses did not testify as appellants had predicted. As an example, appellants predicted (R. 1485) that they would prove that an employee of Graybar (the Hotpoint distributor) had talked with representatives of Broadway-Hale shortly before Manfree lost the Hotpoint line, but the facts turned out to be to the contrary (Tr. 3271-3272).

on other grounds unrelated to the pretrial order of August 13, 1965.²⁹

Thus the pretrial order had no effect on the admissibility of evidence at the trial, as the trial court consistently applied a policy of liberal admissibility. Nor in deciding the motions for directed verdict did the trial court consider itself bound by any particular conceptual limits of conspiratorial theory. The court's Memorandum Opinion reflects a clear purpose to review all the facts in evidence in the total context of the case.³⁰ Throughout the opinion the court, without applying any labels of "vertical" or "horizontal" conspiracy, knocks out any possible underpinnings of appellants' vertical conspiracy theory. The posture of the case required the court to analyze the dealings between each set of appellee (or alleged co-conspirator) manufacturer, distributor and retail outlet, as to pricing practices, advertising policy, and understandings (there were none) as to discount stores in San Francisco. The Memorandum Opinion canvassed each such vertical series, including the arrangements among General Motors (manufacturer), Frigidaire Sales Corporation (distributor), Broadway-Hale and other retail stores, as well as the interstitial relations between and among each and every permutation of these sets.³¹ The court found that no reasonable inference of conspiracy radiated from any of these groupings, horizontal or vertical.

29. In the portion of their brief relating to the trial court's evidence rulings, appellants now argue that some of these items were erroneously excluded. However, appellants do not contend that any of the unfavorable rulings were based on the pretrial order of August 13, 1965. See discussion of appellants' arguments in Part V of this brief, *infra*.

30. See Memorandum Opinion, R. 1918:

"Bearing in mind the difficulties encountered in the proof of a conspiracy and giving plaintiffs the full benefit of the great mass and volume of evidence produced and without attempting to compartmentalize the various factual components thereof and wiping the slate clean after scrutiny of each"

Compare *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

31. For example, the trial court found that "evidence as to the course of dealings with the five retailers varies widely from one distributor to another. Plaintiff seizes on each *different and varying set of circumstances*, no matter how inconsistent, to argue that the five retailers 'called the tune' in San Francisco" Memorandum Opinion, R. 1947. (Emphasis added.)

III. The Trial Court Properly Separated the Issues of Liability and Damages for Trial, and This Ruling Had No Prejudicial Impact on Appellants' Case.

The trial of these cases was bifurcated, pursuant to the August 13, 1965 Pretrial Order of the court, into separate presentations on the issue of liability and on the issue of the amount (if any) of damages (R. 1608-1609). It was expressly ordered, however, that these separate showings would have to be made before the same jury. (*Ibid.*) No opportunity arose for appellants to put on the damage phase of their case, since the trial court granted appellees' motions for directed verdicts on the issue of liability.³² Appellants now complain, at pp. 133-135 of their brief, that the bifurcation of the trial somehow constituted reversible error.

Rule 42(b) of the Federal Rules of Civil Procedure expressly authorizes the separate trial of discrete issues, such as occurred here.³³ Separate trials on the issue of liability and damages have been utilized in numerous cases.³⁴ Use of this technique to simplify and expedite the trial of antitrust cases has been urged by many conversant with the problem.³⁵

32. More than anything else, the finding of no *prima facie* liability by the trial court confirms the wisdom of having segregated the damages issue.

33. Rule 42(b) provides in part that:

"The court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial . . . of any separate issue or of any number of . . . issues. . . ."

34. *E.g.*, *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543 (9th Cir. 1960); *Hosie v. Chicago & N.W. Ry.*, 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959); *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770 (D.D.C. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959); *Nettles v. General Acc. Fire & Life Assur. Corp.*, 234 F.2d 243 (5th Cir. 1956).

35. *E.g.*, Judicial Conference of the United States, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, pp. 51-52, 99 note 28 (1960). See also *Seaboard Terminals Corp. v. Standard Oil Co. of New Jersey*, 30 F. Supp. 671, 672 (S.D.N.Y. 1939).

Appellants' arguments seem to be that separate trials are inappropriate in antitrust cases, and that appellants somehow were hampered in showing the "impact" of the alleged conspiracy (Appellants' Opening Brief, pp. 134-135). But these arguments verge on the absurd, and have utterly no realistic application to the present matter.

The threshold problem faced by appellants was to prove the existence of a conspiracy. This they failed to do, although permitted great latitude by the court. Quite obviously it was better to call a halt to the matter after the failure of appellants' conspiracy claim than to prolong the trial while appellants put in additional futile, lengthy proof on their alleged damages. And it makes no sense whatever for appellants now to complain that they were prejudiced by their inability to put on proof of damages or impact;³⁶ the granting of the directed verdicts in no way depended upon the question of impact or damages.

IV. The Trial Court Properly Granted the Motions for Directed Verdict; There Was No Evidence Which Would Support Any Fair or Reasonable Inference of Any Conspiracy Involving Frigidaire or Any Other Appellee.

At the conclusion of appellants' case, no evidence of a conspiracy—whether horizontal or vertical—had been presented. It was clear, from an evaluation of the entire record, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that no reasonable inference of a conspiratorial boycott to deprive Manfree of television sets and major household appliances could be drawn. The trial court accordingly determined that the motions for directed verdict should be granted.

In its Memorandum Opinion, the trial court enunciated the standards it applied in granting the motion, as follows:

36. The only evidence that appellants claim was improperly excluded because of the bifurcated trial ruling is Pl. Ex. for Id. Nos. 1500 and 1500-1. These exhibits are a schedule purporting to show a decline in Manfree's sales and profits from 1957 to 1964. However, appellants offered the schedule only to show that they had been injured (Tr. 5940). For a discussion of the propriety of the ruling excluding the schedule, see Part V(A)(5) of this brief, *infra*.

"Before the Court can grant a motion for a directed verdict and thus withdraw the case from the jury, as a matter of law it must be convinced that no jury could reasonably bring in a verdict for the plaintiffs, and it must arrive at this conclusion after reviewing and considering the evidence as a whole in the light most favorable to plaintiffs and after giving the plaintiffs the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be reasonably drawn." (R. 1916)

As the Memorandum Opinion shows, the trial court followed the well established test. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*; *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196 (9th Cir. 1963); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Safeway Stores v. Fannan*, 308 F.2d 94 (9th Cir. 1962); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

That the present cases concern a claim of conspiracy does not take them out of the established rule. The existence of an alleged agreement or conspiracy is a fact which, like other facts, must be proved by competent evidence, direct or circumstantial. There must be evidence that permits a reasonable inference that there in fact was an agreement or commitment to a common scheme. *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*; *Girardi v. Gates Rubber Co. Sales Div., Inc.*, *supra*; *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963); *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 210-211 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).³⁷ Speculation, surmise

37. Appellants endeavor to construct a parallel between the facts concerned in the present appeal and the facts in *Standard Oil Co. of California v. Moore*, *supra*. In the *Moore* case, this Court held that the plaintiff had made out a prima facie case of conspiracy, but reversed a jury verdict for plaintiff because important evidence—indeed, the evidence on which the sufficiency of plaintiff's case depended (251 F.2d at 217)—had been erroneously admitted. In no pertinent respect does the *Moore* case bear any similarity to the present cases. In *Moore* there was substantial evidence that the defendants not only acted identically in their marketing policies and

or conjecture are not enough to take such a case to the jury. Nor is there a *prima facie* case where the evidence shows merely that the parties acted similarly, unless the circumstances logically suggest that the similarity was because of joint action. *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*, 322 F.2d 656, 661.

In the present cases there was no competent evidence—direct or circumstantial—that would have justified submitting the matter to the jury as to General Motors, Frigidaire or any other appellee. It was more than a simple failure of proof; here the evidence that plaintiffs so laboriously introduced throughout the lengthy trial positively disproved their own fanciful theories of conspiracy. The evidence shows General Motors, Frigidaire and each of the other appellees acting independently and differently from one another, without any common plan, indeed without any knowledge or understanding of one another's plans and intentions.

Before we proceed to an examination of the relatively small amount of evidence concerning General Motors and Frigidaire, we shall take up the major items of evidence destroying appellants' theory that there was any conspiracy involving any appellee.

A. ALL OF APPELLANTS' THEORIES OF CONSPIRACY WERE DESTROYED BY THE EVIDENCE.

1. The witnesses who would have known of any alleged conspiracy denied there was one.

There was no direct evidence of any conspiracy, and appellants conceded as much (R. 1439). Appellants therefore have endeavored to construct their case from circumstantial evidence and, in particular, argue that appellants acted uniformly and that from this unexplained uniformity, a trier of fact should

in refusing to sell to the plaintiff, but had acted cooperatively and in concert to boycott price-cutting dealers such as Moore, and communicated with one another concerning the boycott (251 F.2d at 207-209).

Nor is there the slightest parallel between the present cases and *United States v. General Motors Corp.*, 384 U.S. 127 (1966), cited by appellants. There the Supreme Court found abundant evidence of explicit agreement, and of cooperative efforts to "police" a program of deterring automobile dealers from selling to "discount houses." The opinion of the Court states in part that "... joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." 384 U.S. at 143.

infer conspiracy.³⁸ Appellants cite the landmark case of *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), in which it was held that evidence of an explicit written invitation to join in a common scheme, coupled with evidence that the parties in fact had subsequently acted identically, comprised sufficient proof to support an inference of conspiracy—where the parties gave no explanation of their behavior and did not deny that an agreement had been reached. The Court spelled this out as follows:

“Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions

“This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action.” *Id.* at 225.

In the present cases the witnesses not only fully explained their conduct (of which more will be said below) but expressly denied that there was any agreement or conspiracy (*e.g.*, Frigidaire at Tr. 4282-4283; 4094-4095 and 4322; Broadway-Hale at Tr. 445; 1337 and 1541; General Electric at Tr. 4399 and 5299-5300).³⁹ Of

38. As we shall demonstrate, appellees did not act uniformly and their conduct was fully explained as normal, independent, nonconspiratorial, business behavior.

39. Conscious of this defect in their cases, appellants argue that the testimony of each witness somehow was impeached (Appellants' Opening Brief, pp. 121-122), and in this effort distort and misstate the record. For example, appellants accuse Mr. Thomas, one of the Broadway-Hale witnesses, of throwing away business records, implying that relevant facts thus were concealed, when the record shows only that the witness cleaned out his own desk when Broadway-Hale went out of the appliance and television business in 1963; there is no indication whatsoever that anything was thrown away of any significance to these cases (Tr. 1527-1528). Appellants also assert that this same witness “filed false and misleading answers to interrogatories” (Appellants Opening Brief, p. 122), but the record of the trial where this matter was gone into in detail shows that appellants' irresponsible charge is false (Tr. 1441-1445).

course, a trier of fact would not be compelled to believe this testimony if there were evidence to the contrary. *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196 (9th Cir. 1963). But here there was no contrary evidence.

2. The decisions not to sell to appellant Manfree were made independently and were supported by independent business reasons.

Appellants argue that there was a uniform pattern of refusals to deal with Manfree and that the refusals were largely unexplained or that the explanations were obscure or specious and should be disregarded. In fact the pattern of contacts between appellee distributors and Manfree (and other distributors and Manfree) is anything but uniform; at most the evidence showed a series of independent decisions arrived at unilaterally.⁴⁰

Of the four appellees who were in a position to sell to Manfree (the three distributor appellees, plus General Electric, which sold its "General Electric" brand merchandise directly to retailers), California Electric Supply sold Philco merchandise to Manfree from about May 10, 1957 to September 12, 1958, Maytag West Coast sold Maytag appliances to Manfree from January of 1958 to March of 1959, General Electric had discussions with Manfree in the years 1958 to 1960 but decided not to franchise Manfree, and Frigidaire was not asked by Manfree for a franchise until 1960 and then declined to make Manfree a dealer. It is hardly surprising that none of these appellees took Manfree on as a dealer

40. Appellants argue that this evidence of independent business decisions should be disregarded, citing *Standard Oil Co. v. Moore*, *supra*, (Appellants' Opening Brief, pp. 97, 102-103). But appellants misread the *Moore* decision, which held merely that testimony by defendants that they acted out of independent business motives was not dispositive where this testimony was contradicted by substantial evidence of conspiracy. 251 F.2d 188, 211. Compare *Independent Iron Works, Inc. v. United States Steel Corp.*, *supra*, where—as in the present cases—evidence of independent business behavior stood uncontradicted, justifying directed verdicts for defendants. 322 F.2d 656, 661.

after suit was filed in 1960.⁴¹ At various times Manfree handled the Hotpoint and Norge lines, purchasing them from independent distributors.⁴²

In each instance where a decision was made not to sell to Manfree, there were independent, nonconspiratorial business reasons. California Electric Supply ceased selling to Manfree because the latter's purchases dropped off and Manfree indicated a lack of interest in the line (Tr. 3692-3693). Maytag West Coast allowed Manfree's dealer franchise to expire because Manfree's personnel were apathetic about selling Maytag and rebuffed efforts to give them dealer training, U.S.E. was a membership operation which restricted potential sales, and the manager of Manfree's appliance sales had a drinking problem and was offensive to customers (Tr. 3376-3379; 3428). At the same time that Manfree's Maytag dealership was allowed to expire, 20 to 30 other Maytag dealers in San Francisco, including Lachman Bros. and Sterling, likewise were dropped (Tr. 3332-3333). Frigidaire concluded not to franchise Manfree because Manfree had a cramped, unattractive appliance department and simply did not appear to be a promising dealer prospect (Tr. 4317-4321). Such distributors other than appellees as decided not to sell to Manfree also had their own independent reasons. For example, the distributor of Norge products took exception to U.S.E.'s use of "bait and switch" advertising of appliances (Tr. 2867-2869). Thus, the evidence utterly failed to show that appellees—or any other of the alleged

41. Appellants would, in effect, impute a duty on the part of the vendor appellees to sell to Manfree because suit was filed, citing *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962). See Appellants' Opening Brief, pp. 100-101. This is not the law. Moreover, none of the appellees has ever contended that the filing of the litigation, *ipso facto*, constituted sufficient cause not to deal with Manfree. The *Bergen* case is distinguishable: it arose in the context of a motion for *preliminary injunction*. There the plaintiff's existing business was cut off by defendant *after* initiation of the lawsuit. The court was influenced by the fact that the conduct of the litigation could have otherwise been frustrated. Compare *Hutchinson v. American Oil Co.*, 221 F. Supp. 728, 732 (E.D. Pa. 1963). Frigidaire, of course, never dealt with Manfree before or after the filing of these cases.

42. Manfree also carried major lines of other companies such as Sylvia (Tr. 5714; 5824-5825).

co-conspirators—followed any pattern of conduct with respect to appellants that would support any inference of conspiracy. On the contrary, there was nothing mysterious, nothing unexplained, and nothing other than straightforward, understandable, independent business decisions.

3. There was a lack of relevant communications between any of the appellees.

For a conspiratorial agreement or understanding to have arisen, there obviously would have had to be some form of communication between the conspirators and some knowledge of each other's plans and intentions. *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 716 note 17 (1948); *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 211-212 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). Here again appellants argue that this was something for the trier of fact to infer—but again the argument flies in the face of the facts. The record is wholly deficient in evidence of communications between any of the appellees (or between appellees and any of the alleged co-conspirators) on the subjects that appellants assert were part of the alleged conspiracy: the question of selling to Manfree, the alleged policy of not selling to discount houses and the alleged insistence upon adherence to list prices. On such a crucial question as the decisions that were made by distributors whether or not to sell to Manfree, the record makes it quite clear that one distributor did not know what another was doing or planning to do (*e.g.*, Tr. 3276; 4194-4195; 4283; 4322). For example, the evidence is uncontradicted that Frigidaire did not discuss with any other distributor, or any manufacturer, or any dealer—or anyone else—the question of whether it would franchise Manfree (Tr. 4079-4080; 4283; 4321) and that Frigidaire had no knowledge of what the plans or intentions of other distributors were in this respect (Tr. 4063-4069; 4283-4284). Nor did any of the appellees, whether manufacturer or distributor, discuss San Francisco discount stores with any other appellee (*e.g.*, Tr. 1214; 3592; 4068).

Appellants try to emulate the examples set in some other anti-trust cases and point to the existence of various associations, such as NEMA, the Northern California Electrical Bureau (NCEB)⁴³ and the San Francisco Better Business Bureau, suggesting that these may have served as a breeding ground of conspiracy. But again—notwithstanding appellants' distortions and misstatements of the record—the evidence showed nothing more than mere membership by some appellees in some associations, and meetings at which nothing occurred relevant to the present suits.

4. Appellees had no uniform policy of refusing to deal with discount houses.

Appellants constantly reiterate the assertion that the vendor appellees and alleged co-conspirators had a joint and uniform policy of not selling to so-called "discount houses" in the San Francisco area and that this demonstrates that there was a conspiracy to boycott appellants who, of course, purported to be a discount house.

43. Appellants tried to show that members of the NCEB, including Frigidaire, had conspired at its meetings to boycott "discount" stores in San Francisco. The testimony of all the witnesses questioned about the organization rebutted any such implication, and denied that the matter of prices or discount stores had ever been discussed at those meetings (*e.g.*, Tr. 919-920; 985; 3131; 3142; 4063-4071). The NCEB, it developed, was an association composed of all elements of the electrical industry in Northern California, not limited to the appliance industry (Tr. 3129-3130). NCEB was open to all industry members, and embraced manufacturers, distributors, retailers and others (Tr. 3130). Appellants' only "evidence" of their charge was Pl. Ex. No. 2090, which comprised minutes of a NCEB committee meeting to promote the sale of dishwashers (Tr. 972-979). The dishwasher campaign, open to all retailers of every participating brand, was co-sponsored with Pacific Gas & Electric Company (Tr. 3134; 1953). The campaign was merely directed at sales of dishwashers generally (Tr. 4282; 4286). Retailers were compensated for allowing a five-day trial period to customers (Pl. Ex. No. 2090). In order to qualify for reimbursement, a retailer had to submit a claim form, indicating, among other things, the model number and list price of each dishwasher sold. The witnesses cleared up the reason for this information: the promotion was conducted only for deluxe model dishwashers, and the data was needed to verify dealer compliance with this rule (Tr. 4069-4070; 980-983). It had no bearing on what price the dishwashers were sold at (Tr. 980). There was no exchange of pricing information nor any attempt to secure maintenance of suggested list prices in San Francisco (Tr. 4068-4071).

But the evidence disproves any theory that appellees had any uniform policy of refusing to sell to discount houses. Indeed, at various periods of time, Manfree *did* purchase merchandise manufactured or distributed by certain of the appellees, including the Philco, Maytag, Norge and Hotpoint brands. At the same time, another discount house in San Francisco, GET, was a franchised dealer for a number of major brand appliances and televisions, including Hotpoint (Tr. 6073-6074; 3185-3186), Norge (Tr. 2895) and Westinghouse (Tr. 6169). Many of appellees' brands were also sold to other discount houses in the San Francisco area, including White Front⁴⁴ (Tr. 4376-4382).

In the case of appellants, the evidence showed that such problems as they may have experienced from time to time in obtaining merchandise arose for reasons other than their operation as a self-styled "discount house." Admittedly, the fact that from the time they commenced business in 1957 until 1961, appellants operated as a "closed-door" membership store—unlike most other discount houses⁴⁵—was considered by some (but not all) of the distributors to make appellants a less desirable retail outlet than outlets open to all the public. Obviously a store operated as a "closed-front" store limited its range of customers, and might even alienate those who objected to paying a so-called membership fee that went into the pockets of the storeowners.

5. There was no uniform policy of selling, tagging or advertising at suggested list prices.

Appellants argue that appellees and the alleged co-conspirators had the uniform practice of requiring television sets and household appliances to be tagged, advertised and sold at no less than suggested list prices. The relevance of this argument is not as clear as appellants seem to think. Appellants' theory, of course, is that because they held themselves out to be "discounters" and

44. White Front advertising indicated that it was carrying General Electric, R.C.A., Whirlpool, Philco and Norge lines of appliances and television sets at a discount (Appellants' Opening Brief, p. 76).

45. White Front, by contrast, was not a *closed-door* store.

advertised "discount" prices, appellees boycotted them.⁴⁶ But the testimony of appellants' appliance manager showed that U.S.E. frequently advertised the numerous lines of television and household appliances it carried without specifying *any* prices in the advertisements (Tr. 5647),⁴⁷ and while appellants assert that Manfree priced its merchandise for sale at "cost" (which was not clearly defined), plus 20%, the record does not show that Manfree's prices in fact were any lower than those charged by other San Francisco retailers.⁴⁸ In any event, the evidence demonstrated that appellees and the alleged co-conspirators had no uniform practice with respect to the selling, tagging or advertising of merchandise at suggested list prices. Some manufacturers furnished schedules of suggested retail list prices to their distributors and in some instances these schedules were passed on to the latter's dealers. In other instances distributors independently constructed their own suggested retail price sheets and furnished them to dealers. And in other instances no suggested retail prices at all were furnished to dealers. For example, commencing in 1960 with its 1961 models, Frigidaire promulgated no suggested retail price lists at all (Tr. 4086). Frigidaire decided to abandon any circulation of suggested prices because dealers ignored them

46. In at least one instance in which price advertising was used, U.S.E. was shown to have advertised an R.C.A. radio at *higher* than the suggested list price (Tr. 4824; R.C.A. Ex. No. 11007). Broadway-Hale sometimes advertised its prices as "low discount prices" (Tr. 1321).

47. Throughout the trial and in their brief, appellants assumed as proven that U.S.E.'s style of selling set it apart from other San Francisco retailers. The record shows just the opposite. The appliance division manager of Broadway-Hale, for example, testified that he considered U.S.E. no more competitive to Broadway-Hale than any other San Francisco retailer (Tr. 1363-1364).

48. The only evidence appellants point to on this question is that Broadway-Hale *would have liked* to have achieved—but in fact did not achieve—a markup of 30% or more (Pl. Ex. Nos. 349 and 350; Tr. 270-271; 3436). Some of the list prices suggested by distributors would have permitted a markup of approximately 30% but again the evidence showed the general practice of San Francisco retailers to sell below such list prices as existed (*e.g.*, Tr. 901; 2352-2353; 3289; 5029; 5646; 5648-5649). At least one witness confirmed that U.S.E.'s prices on refrigerators were "no bargain," and were about "the going price" (Tr. 4318).

anyway and Frigidaire believed the level of prices actually charged to consumers was substantially below the retail prices Frigidaire previously had suggested (Tr. 4085-4092).

It is clear that there is nothing in the least illegal about furnishing lists of suggested retail prices to dealers. Even had dealers actually followed the practice of selling at suggested prices, this would have been no violation of the law. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963). But in the present cases the record shows without contradiction that retailers in San Francisco frequently and generally sold at prices other than whatever prices may have been suggested to them (*e.g.*, Tr. 1453; 4085-4086; 5029). Appellants' own officers admitted this (*e.g.*, Tr. 5646; 5648-5649) and admitted that Broadway-Hale was one of the biggest discounters in San Francisco (Tr. 5646).

Nor was there any common practice of advertising or tagging at suggested list prices. Again the uncontradicted evidence showed that retailers frequently advertised below whatever list prices were suggested to them (Tr. 1431-1433; 1450; 1515-1516; 2352-2353) and again Broadway-Hale was one of those that often advertised "discount" prices (Tr. 209; 430; 729-730; 1321; 5646). A person could find six different prices on the same piece of merchandise in six stores (Tr. 1183). A few distributors at times would extend cooperative advertising allowances to dealers only for such advertising as featured suggested retail prices—but even then the dealers could advertise at any prices they chose if they wished to pay the entire cost of their own advertising. Other distributors granted advertising allowances to dealers regardless of what prices were featured in the advertising, including General Electric (Tr. 1431-1432; 5225), Maytag West Coast (Tr. 3383-3384)⁴⁹ and Frigidaire (Tr. 4088).

49. Evidence was introduced of many specific instances in which Maytag dealers, including Broadway-Hale, received advertising allowances for below-list advertising (Maytag Ex. Nos. 13034-13041; 13043-13047; 13049-13054A; 13060; 13069-13070; 13074-13077; 13091-13112; 13114; 13120-13121; 13124-13127; 13133-13136; 13138-13140.) See also Tr. 3384-3403.

6. There was no agreement or joint action to exclude appellants' advertising from the San Francisco newspapers.

Appellants' all-pervasive paranoia is exhibited again in their theory that appellees joined with certain retailers, the San Francisco morning (but not evening) newspapers and other alleged co-conspirators to keep appellants from advertising in those newspapers. However appellants may juggle the facts, this theory comes to nothing.

At all times U.S.E. advertised in the San Francisco Call-Bulletin, then an evening newspaper in San Francisco (Tr. 2168). So did many other retailers, including some of the alleged retail co-conspirators (Tr. 297-299). In the period up to 1961, both the San Francisco Examiner and the San Francisco Chronicle (each then morning newspapers) declined, for different reasons, to accept U.S.E.'s advertising copy. Each newspaper had its own previously established policy that precluded acceptance of such advertising. Contrary to the assertions at pages 119-120 of Appellants' Opening Brief, neither newspaper had a policy against carrying advertising of discount houses⁵⁰ (Tr. 6880-6891; 2096). Instead, both newspapers were concerned about the reactions of their readers who might respond to advertising and then be confronted by some "membership" or "fee" gimmick that prevented them from purchasing advertised merchandise. The Examiner would not carry advertising of "membership" or "closed door" stores (Tr. 2094), and the Chronicle would not carry advertising of stores that charged an entrance fee (Tr. 2104-2105). After U.S.E. dropped its membership requirement and its entrance fee in 1961, it had no difficulty advertising in either newspaper (Tr. 2156-2159).

Now how does all this show that Frigidaire or General Motors, or any appellee, conspired with anyone to do anything? It doesn't. For example, there was no evidence that Frigidaire or General Motors ever discussed U.S.E.'s advertising with the newspapers or with retailers or anyone else, or knew of the decisions of the

50. Broadway-Hale on occasion advertised its "low discount prices" (Tr. 1321).

Examiner or the Chronicle not to accept advertising from U.S.E. or had even the slightest interest in the matter (Tr. 4080). Nor is the evidence significantly different as to any other appellee or retailer.

B. THE EVIDENCE DEMONSTRATED THAT APPELLEES GENERAL MOTORS AND FRIGIDAIRE DID NOT CONSPIRE WITH ANYONE.

Notwithstanding the lengthy trial and the hundreds of exhibits, there was little evidence that had any bearing on appellees General Motors or Frigidaire.⁵¹ However, what little evidence there was demonstrated clearly that neither appellee conspired with anyone. As the trial court observed in its Memorandum Opinion:

"Plaintiffs have failed to make a case against General Motors or Frigidaire. There is no evidence from which a jury could reasonably or fairly infer that General Motors or Frigidaire knew of any conspiracy, committed themselves to one or participated in a conspiracy." (R. 1952)

1. General Motors did not conspire with anyone.

There was virtually no evidence as to General Motors. General Motors manufactures Frigidaire appliances and then sells them to its wholly owned subsidiary, Frigidaire Sales Corporation, which in turn distributes them to retailers. General Motors sells to no retailers and has no dealings of any sort with them. General Motors had no part in any decision whether or not to sell to Man-free or, for that matter, to any other retailer; this was solely within the jurisdiction of Frigidaire. General Motors' sole contact with appellants occurred in July, 1960, when it received one of a number of form letters sent out by appellants (as a predicate to filing suit) requesting to buy merchandise (Pl. Ex. No. 492). The letter immediately was forwarded to the Frigidaire Sales

51. And even in Appellants' Opening Brief, Frigidaire and General Motors are seldom mentioned and then usually only as part of some disparate group of companies which appellants lump together for some mistaken and undocumented generalization.

Corporation branch in Northern California, and from that point on General Motors had nothing further to do with the matter.⁵²

2. Frigidaire did not conspire with anyone.

The relevant evidence relating to Frigidaire Sales Corporation can be quickly stated.

Until receipt of the July, 1960, letter from appellants, Frigidaire had been unaware that Manfree had any interest in a Frigidaire dealership (Tr. 4083; 4222; 4281; 4309).⁵³ Gilbert Hamilton, the local Frigidaire sales manager, immediately responded to the letter by telephoning U.S.E.⁵⁴ Hamilton talked to Mr. Freeman of Manfree and arranged to have a salesman visit Manfree (Tr. 4029-4030; 4032).⁵⁵ A few days later John Shaw, a Frigidaire salesman, inspected the Manfree operation (Tr. 4312-4321). Shaw

52. Appellants also inaugurated a second series of demand letters in 1961. One of these (Pl. Ex. No. 497) was directed to General Motors. This letter was promptly forwarded to the Frigidaire branch office (Pl. Ex. No. 4270).

53. The only prior contacts Frigidaire had with appellants consisted of two routine calls made by a Frigidaire salesman on U.S.E. in 1957 and 1958 as part of a survey of appliance dealers in San Francisco. The evidence does not indicate that appellants asked to buy from Frigidaire or that they requested a Frigidaire franchise on the occasion of those calls. The only recollection any of appellants' witnesses had of these calls was that Mr. Freeman of Manfree recalled being introduced to someone from Frigidaire (Tr. 5825).

54. Appellants tried unsuccessfully to read some mischief into the fact that Hamilton's notes of the conversation had been partially erased (Pl. Ex. No. 491; Tr. 4023-4037). Appellants even ordered infrared photographs of the handwriting in an effort to reconstruct the writing (Pl. Ex. Nos. 1828-1829). Only a few fragmentary words could be made out, but these were unconnected and meaningless, and contribute nothing to this case. Some of the marks had apparently been added by appellants' handwriting expert (Tr. 4036). Hamilton explained that he had made notes on the demand letter during his conversation with Freeman, and may have later erased some of his notes to make them clearer (Tr. 4027-4028). He could only speculate on what the notes had been (Tr. 4033-4034). Appellants never bothered to call an expert as a witness.

55. In his testimony Freeman essentially confirmed the Hamilton account of the telephone conversation. However, Freeman also understood Hamilton to say that Frigidaire did not sell to any closed-door discount

subsequently reported back to his superior Hamilton; both decided they were uninterested in franchising Manfree at that time (Tr. 4039-4041). Shortly thereafter and without any further communication between appellants and Frigidaire, appellants, without bothering to hear Frigidaire's decision, filed suit.

The reasons why Frigidaire did not—within the short period between Shaw's visit and the commencement of the suit—decide to franchise Manfree were fully explored at the trial. The Manfree setup was small, unattractive and there was simply nothing there that led Shaw to believe that Manfree had any appeal as a prospective Frigidaire dealer⁵⁶ (Tr. 4317-4321). The fact that unlike other retailers⁵⁷ who opened their doors to the public, U.S.E. was then a "closed door" store, open only to certain categories of customers, who, in addition, had to pay a membership fee, did not enhance its appeal,⁵⁸ although this was not a determinative factor with Frigidaire (Tr. 4320).

Frigidaire consistently pursued its policy of strictly limiting the number of its franchised dealers and taking on as new dealers only those who satisfied rather stringent criteria (Tr. 4319). Manfree did not measure up to those standards. In 1960 Frigidaire was in the course of reducing the number of its dealers in San Francisco in order to concentrate its line in a relatively few

houses (Tr. 5828; 6037-6038). Appellants misleadingly fragmentize the record in their assertion that Hamilton told Freeman that Frigidaire would not sell to San Francisco discount stores (Appellants' Opening Brief, p. 68). Freeman clearly understood Hamilton to be referring to closed-door discount houses, and he so testified (Tr. 6037-6038).

56. Besides the unappealing nature of the U.S.E. setup, Shaw also received the impression that Manfree was not really interested in a Frigidaire franchise, with all of the attendant obligations of service and the like (Tr. 4316). Manfree simply evinced a desire to buy some Frigidaire merchandise (*Ibid.*).

57. Whether or not a retailer was an "*open-door*" store, of course, had no bearing on its pricing practices, and no bearing on whether it held itself out to be a "discount house." White Front, among others, was an *open-door* discount house.

58. U.S.E. itself decided to become an open-door store in 1961, a year after suit was brought (Pl. Ex. No. 497).

loyal and enthusiastic dealers who would aggressively merchandise the line⁵⁹ (Tr. 4072).

Thus there was nothing mysterious or unexplained about Frigidaire's decision not to franchise Manfree. On the contrary, the evidence showed, without contradiction, that Frigidaire made its decision independently and for normal business reasons. There is no evidence that Frigidaire ever discussed with anyone else the question of selling to Manfree; the Frigidaire witnesses flatly denied there had been any such discussions (Tr. 4079; 4282-4283; 4322). Nor was there any evidence that Frigidaire had any knowledge as to the decisions other distributors had made or intended to make with respect to selling to Manfree (Tr. 4284).

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to sell or advertise appliances at suggested list prices. As we have demonstrated, there was no such conspiracy; there was not even uniformity or similarity of conduct among the appellees. Suggested list prices were not even promulgated by all the manufacturers or all of the distributors. For example, for much of the period involved in these cases, Frigidaire did not publish the suggested list prices, having concluded in 1960 that they served no purpose⁶⁰ (Tr. 4086). During the period

59. Appellants misstate the record in their assertion that representatives of Frigidaire testified that sales to Manfree would have placed the local dealer structureship "in a precarious position" (Appellants' Opening Brief, p. 115). There was no such testimony. Indeed, Frigidaire was itself consciously cutting down its dealerships in San Francisco during this period in order to upgrade the dealers which had potential (Tr. 4071-4072). Appellants suggest that Frigidaire was forced to choose between "downtown" outlets and U.S.E. The record shows, however, only that Frigidaire concluded, as a result of its market survey, that it was poorly represented in the downtown area of San Francisco (Tr. 4305-4306). Frigidaire filled this need by franchising the White House department store, which was not one of the alleged retail co-conspirators (Tr. 4316).

60. Appellants' efforts to dispute this were futile. They attempted to introduce two Frigidaire price sheets which happened to contain handwritten prices in the margins. The handwriting had apparently been inserted by retail employees, and definitely not by Frigidaire. See the discussion in Part V(A)(1) of this Brief, *infra*.

One other try of appellants in this respect should be commented upon. From their Opening Brief at p. 132, an inference could be drawn that Pl.

when Frigidaire had suggested list prices, its dealers generally sold below them (Tr. 4086) and frequently advertised at less than the suggested prices (Tr. 4087-4088). Frigidaire exercised no control whatsoever over the prices actually charged by dealers or used by dealers in advertising Frigidaire appliances (*e.g.*, Tr. 1315-1316). Indeed, Frigidaire through advertising allowances even *subsidized* dealers who advertised at below-list prices. The uncontradicted evidence showed that Frigidaire had granted advertising allowances to dealers irrespective of what prices were being used in their advertising and often gave allowances for below-list advertising (Tr. 4087-4092).⁶¹

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to refuse to sell to discount houses. As we have demonstrated, there was no such conspiracy and there was not even similarity of conduct among appellees. A number of distributors sold to Manfree itself at various times and to other discount houses in the area. Frigidaire sold to many dealers who sold and advertised prices below suggested list. Admittedly, Frigidaire considered it a somewhat unfavorable factor that appellants were a "closed-door" store—but appellants eventually recognized this themselves (after suit had been brought) and opened their doors to the public without charge.

The Frigidaire decision not to franchise Manfree was *not* arrived at because of any conspiracy to favor the alleged retail conspirators. Again, there was no such conspiracy and the relations

Ex. for Id. No. 5050 rebuts the Frigidaire change of pricing policy in 1960. This exhibit, however, does no such thing. It is discussed solely in connection with General Electric's Hotpoint Division (Tr. 5453-5454; Specification of Errors, p. xx), and has nothing to do with Frigidaire.

61. When Frigidaire furnished its dealers with advertising materials used in various promotions, it expressly omitted any reference to price (Tr. 1866; 4088). Appellants mistakenly argue that Frigidaire did require advertising to be at suggested list in order to qualify for an advertising allowance. The sole evidence appellants point to is a 1955-1957 Frigidaire advertising manual (Pl. Ex. No. 338) from which appellants quote at page 35 of their brief. But the portion of the old manual appellants quote shows on its face that the only advertising in which Frigidaire had the policy of using suggested list prices was advertising run nationally or locally by *Frigidaire itself*—and not advertising run by dealers.

between appellees and the five retailers did not even manifest a pattern of uniform conduct.⁶² Frigidaire itself had terminated three of the five retailers—including Broadway-Hale—prior to the time Manfree asked for a Frigidaire franchise (Frigidaire Ex. No. 14003). Frigidaire lost another one of the retailers when Sterling Furniture went out of business in San Francisco during the period involved in these suits.

Finally, Frigidaire's decision not to franchise Manfree was *not* arrived at because of anything having to do with the San Francisco morning newspapers, the San Francisco Better Business Bureau or any trade association activities. The evidence is uncontradicted that Frigidaire knew nothing about the advertising policies of the newspapers or any difficulties that appellants had in placing advertising (Tr. 4080; 4092) and that Frigidaire did not belong to or attend any meetings of the San Francisco Better Business Bureau or the EIA (Tr. 1754; Pl. Ex. for Id. No. 3011). Although Frigidaire was a member of NEMA and AHLMA and its representatives attended some meetings of these associations, nothing of any relevancy was shown to have occurred.

In short, the evidence as to Frigidaire and General Motors presented a complete failure of proof that they conspired with anyone to do anything. But it was more than a failure of proof. The evidence affirmatively showed, without contradiction, that Frigidaire's decision not to franchise Manfree was arrived at independently for normal, understandable business reasons. The trial court clearly had no alternative but to grant the motions of Frigidaire and General Motors for directed verdicts.

V. Exclusions of Evidence by the Trial Court Were Proper.

Appellants urge, as a subsidiary ground of appeal, that various evidence rulings of the trial court were erroneous. Appellants

62. It should be noted that even had it been true that appellee distributors each favored their old, well-established customers, this would have been perfectly normal, independent business behavior and would have given rise to no inference of conspiracy. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 663 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F.2d 797, 798-799 (4th Cir. 1951).

have undertaken a heavy burden. It is a basic principle that cases are not to be reversed for errors in rulings on evidence or other matters unless they "affect the substantial rights of the parties." 28 U.S.C. § 2111 (1964). See *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Segal v. Cook*, 329 F.2d 278 (6th Cir. 1964).

Of course, before they can reach the question of alleged prejudicial effect emanating from exclusion of evidence, appellants must show that the trial court rulings were erroneous. This they cannot do. The trial court was faced with a sizeable task in ruling on the admissibility of evidence. Appellants did nothing to ease the court's burden. Appellants went into the trial with the apparent strategy of introducing in evidence (often in random order) hundreds of documents and the testimony of dozens of witnesses, all in the hope that out of this welter of repetitive and largely irrelevant evidence, some suggestion of a claim might emerge. The trial court acted with patience and restraint; in ruling on the admissibility of evidence it gave appellants great leeway. But it was necessary to impose some limits, to exclude some evidence because it was purely cumulative or without any conceivable relevancy or obviously inadmissible hearsay or otherwise without proper foundation. And in every instance, it is submitted, the court's rulings were proper.

A. EXCLUDED EVIDENCE PERTAINING TO FRIGIDAIRE OR GENERAL MOTORS.

Out of the melange of testimony and documents offered by appellants, relatively little pertained to Frigidaire or General Motors, and virtually all of that was received in evidence. Appellants complain of the exclusion of only a few items that can be said to relate to Frigidaire or General Motors. As we shall demonstrate, each of these items was properly excluded but even if it had been admitted it could have had no conceivable impact upon the outcome of the trial.

(1) *Frigidaire Price Sheets*.—Appellants complain⁶³ of the exclusion of certain Frigidaire price sheets (marked as Pl. Ex. for

63. See Appellants' Opening Brief, p. 152.

Id. Nos. 4170 and 4178) obtained respectively from the files of Lachman Bros. and Redlick's. These price sheets were issued by Frigidaire subsequent to its abandonment in 1960 of publishing suggested retail prices for the guidance of its dealers. Thus, the printed sheets as issued by Frigidaire contain no suggested retail prices, but do contain the wholesale prices that Frigidaire charged to its retailers. The space on the sheets where suggested retail prices had appeared prior to 1960 is left blank.

The significance that appellants claim to discern in the particular price sheets that are part of Exhibits for Identification Nos. 4170 and 4178 is that some handwritten prices have been inserted in the blank spaces on some of the sheets. Appellants argue that these handwritten prices show that Frigidaire continued to suggest retail prices to its dealers in 1960 and thereafter (Appellants' Opening Brief, p. 152). But the facts are to the contrary, and appellants were spectacularly unsuccessful in laying a foundation for admissibility of the handwriting against Frigidaire.

Gilbert Hamilton was the only Frigidaire witness at the trial whom appellant questioned about the price sheets. He acknowledged that the printed portions of the exhibits were price sheets issued by Frigidaire (Tr. 4101-4102). Hamilton knew nothing about the handwritten notations appearing on some of the sheets, could not identify the handwriting, and denied that Frigidaire had orally communicated the handwritten prices or any other suggested prices to its dealers (Tr. 4101-4109).

Through another witness, appellants were able to establish the nature and authorship of the handwritten figures appearing on Exhibit 4170, the Frigidaire price sheets from the files of Lachman Bros. The manager of Lachman's appliance department testified that he or his assistant had written some of *Lachman's* retail prices on the sheets (Tr. 1900-1901). He emphatically stated that he himself had decided on these prices (Tr. 1904) and had not discussed them with any Frigidaire representative (Tr. 1901-1902; 1904; 1910).

As to the price sheets from the files of Redlick's (Ex. for Id. No. 4178), appellants failed to call any witness to identify the source or even the purpose of the handwritten notations on those

sheets. However, appellants' counsel stipulated that the handwriting was *not* on the sheets when Frigidaire sent them to Redlick's (Tr. 2267-2268).

Thus, while the printed price sheets in Exhibits 4170 and 4178 were unquestionably shown to have been issued by Frigidaire—as were other printed price sheets that were received in evidence—appellants failed to demonstrate any foundation for admitting the handwritten notations in evidence against Frigidaire. No connection between Frigidaire and the handwriting was shown; indeed, appellants proved (and stipulated) the contrary. The exhibits were irrelevant and without adequate foundation; the trial court correctly refused to admit them against Frigidaire.

(2) *Quarterly Reports of Advertising Allowances*.—Appellants also complain that the trial court excluded portions of Frigidaire's so-called 1958 "Dealer Advertising and Special Promotional Funds, Quarterly Report."⁶⁴ This form showed credits by Frigidaire to dealers for various types of advertising allowances during 1958 (Tr. 4257-4258). The full report, not offered in evidence, showed that Frigidaire had granted advertising allowances to numerous dealers in the San Francisco area, and not just the four alleged retail co-conspirators listed in the portion of the report offered by appellants (Tr. 4259).

Frigidaire, of course, never raised any question but that it granted to its dealers—including *at times* certain of the alleged retail co-conspirators)—various advertising and promotional allowances. This is all the exhibit showed. A great deal of evidence, even though irrelevant, had already been received on this point. See, *e.g.*, Tr. 4088-4092. There was no showing by appellants that Ex. No. 1985 was any more significant than any of the evidence that was admitted (Tr. 4259). It was irrelevant to appellants' case, and was properly excluded.

(3) *Deposition Testimony of Arthur Alpine*.—Appellants claim that the court erroneously excluded from evidence portions of the deposition of the late Arthur Alpine.⁶⁵ The reason for the

64. See Appellants' Opening Brief, p. 159.

65. See Appellants' Opening Brief, pp. 152-156; Specification of Errors, V, H, (c), p. xxxv.

court's ruling was that Alpine's untimely death had deprived appellees of effective cross-examination on certain memoranda involved in the deposition (Tr. 6224-6225; 6251-6252; 6256). It is quite clear from a review of the events surrounding the taking of this deposition that this ruling was correct.

At the time his deposition was taken in 1961, Alpine was president of U.S.E. and a vice-president of Manfree as well as a principal shareholder. At the deposition he testified as to certain conversations with representatives of appellees and as to various memoranda and notes of these conversations. Despite repeated requests by appellees during the deposition to see these memoranda, and to utilize them in cross-examining Alpine, appellants' counsel resolutely refused to produce them (Tr. 6219-6221). The deposition was finally recessed with this issue still unresolved (Tr. 6229; 6231-6232). In January, 1962, one of the defendants directed interrogatories to appellants requesting dates and other foundational facts as to these memoranda, preparatory to a motion to produce (R. 299a-299c). Appellants' counsel secured an extension of time to answer (Tr. 6247). In the meantime, on February 18, 1962, Alpine died (Tr. 6224; 7022). Appellants' counsel nevertheless persisted in his refusal to respond to these interrogatories, so a court order had to be sought (R. 242) and—after three months of disagreement by appellants as to its form (Tr. 6224)—eventually obtained. The documents were not produced until one year after Alpine had died (Tr. 6224). Thus, despite repeated requests, appellees were never able to cross-examine Alpine on his papers and check the consistency of his testimony.

At trial, the court carefully reviewed all of the Alpine deposition transcripts (Tr. 6256) and evaluated the notes and memoranda themselves (Tr. 6251-6252). The court finally excluded only those few portions of the deposition dealing directly with documents as to which appellees had been deprived of an opportunity to cross-examine the witness (Tr. 6251-6252; 6256). It admitted the balance of the deposition.⁶⁶

66. It is worth noting in this connection that appellants' counsel voluntarily chose not to have the admitted portions of the deposition read to the jury (Tr. 6277).

There is ample precedent for excluding depositions where a deponent has died before completion of cross-examination. This has been the customary rule. *E.g.*, *Continental Can Co. v. Crown Cork & Seal, Inc.*, 39 F.R.D. 354, 356 (E.D. Pa. 1965). The case cited by appellants, *Re-Trac Corp. v. J. W. Speaker Corp.*, 212 F. Supp. 164, 168 (E.D. Wis. 1962), is distinguishable, since plaintiff there had had what appeared to be full cross-examination and had not indicated with particularity the scope or the significance of the matter not completely investigated.

In the instant case, it is clear that appellants' erroneous stand in not initially producing the documents seriously inhibited effective cross-examination of Mr. Alpine, who was clearly not a disinterested witness. The memoranda would have permitted appellees to test the memory of Alpine as to these conversations and to determine whether his testimony was truthful⁶⁷ (Tr. 6216-6217). Counsel recognized this (Tr. 6227). Cross-examination, particularly in these circumstances, is far too important a right to be disregarded. *Degelos v. Fidelity & Cas. Co. of New York*, 313 F.2d 809 (5th Cir. 1963). The court's ruling was therefore entirely proper and was indeed necessary to avoid manifest unfairness to appellees.

There was, in any event, no prejudice to appellants arising from exclusion of the few pages of the Alpine deposition relating to Frigidaire.⁶⁸ This testimony concerned Shaw's visit to the Manfree premises in response to the July, 1960, letter from appellants, and was largely repetitive of other testimony at the trial from Freeman of Manfree and from Shaw himself (Tr. 4314-4316; Appellants' Specification of Errors, V, H, p. xxxv).

67. The trial court noted the "extreme difficulty" in ascertaining the dates of the memoranda (Tr. 6251). Although it was claimed the memoranda had been made contemporaneously with Alpine's conversations, the court discerned contrary indications on the face of the memoranda (Tr. 6251-6252). For one thing, the declarations could not have conceivably all been made by the deponent. The handwriting was different. Some of the memoranda were typed. Some contained statements made during the deposition and not found in Alpine's handwritten notes (Tr. 6252).

(4) *Documents Relating to Trade Associations*.—Appellants argue, at pp. 164-165 of their Opening Brief, that there was error in the exclusion of certain exhibits relating to various trade associations such as NEMA, AHLMA and EIA.⁶⁹ In every case, appellants failed even to authenticate the documents or lay any foundation for their admissibility. The typical “showing” made by appellants to support admission of these documents was for appellants’ counsel to state—without the benefit of sworn testimony or other proof—that the documents had come from somebody’s files (*e.g.*, Tr. 3515-3518). In any event, these documents, without exception, were irrelevant and contained nothing bearing on the issue of conspiracy.

Pl. Ex. for Id. No. 2093 purports to be NEMA minutes of a meeting of its Consumers Products Division’s board of directors held in October of 1961.⁷⁰ A passing reference made therein to “mass merchandising” is seized upon by appellants as evidence of a national conspiracy against discount houses. But all that the minutes—largely a string of unrelated excerpts—observe is that sale of major appliances by mass merchandisers “makes it difficult to identify what the retail business really is,” referring to the difficulty of obtaining statistical data as to such sales. No more is said about the topic in Ex. No. 2093.

Pl. Ex. for Id. No. 2094, also purportedly NEMA committee minutes, notes that some members had proposed improved techniques for reporting industry sales by requesting so-called “mass merchandisers”—not single outlet retail stores such as Manfree or U.S.E.—to set up records showing the destination of appliance shipments. The idea was dropped at the same meeting, and the matter was left to the individual member companies. It was later decided that NEMA would not even participate in drafting a form letter for use by companies (Pl. Ex. for Id. No. 2095). There is nothing in these exhibits, then, more than a concern about im-

69. Frigidaire was not even affiliated with the latter organization (Pl. Ex. for Id. No. 3011).

70. As an example of appellants’ misreading of these documents, its counsel stated at trial that Frigidaire and Philco representatives were present at this meeting (Tr. 6459). Yet the document states on its face that these members were *absent* from the meeting (Pl. Ex. No. 2093).

proving collection of sales data, and this was ultimately abandoned.

Pl. Ex. for Id. No. 3010, purportedly consisting of minutes of a special NEMA-AHLMA committee on dealer classifications, is equally irrelevant. The purported minutes merely reflect an effort by the industry to arrive at a correct definition of "mass merchandisers" for ascertaining the amount of business done by this class. Mass merchandisers did not readily fit existing industry classifications, so the committee undertook to describe, as precisely as possible, their distinguishing features and thereby define this class.

Appellants also complain of the exclusion of Pl. Ex. for Id. Nos. 2097 (A, F, S) and 2098 (A, M) as proof of the policies of NEMA and AHLMA to restrict dissemination of industry statistical data, gathered through their efforts, to their own members. This is the only purpose for which these exhibits were offered. As such, they are irrelevant and meaningless, as well as hearsay.

Complaint is also leveled at the exclusion, for irrelevancy, hearsay and foundation reasons, of Pl. Ex. for Id. Nos. 2099 (A, G, H, O), 3000 (A, M), 3004 (A, K), 3036 (E-AF) and 3024. These exhibits were offered for the purpose of establishing that NEMA and AHLMA members had agreed to exchange information on retail sales of their products by price classification. Appellants have misread their exhibits. Ex. No. 2099, for example, related to institution of a quarterly report of sales of electric dishwashers, as broken down by fairly broad *factory* price categories. There is no suggestion that prices of individual manufacturers would be disclosed to association members. Ex. No. 3000 doesn't even yield this type of information. Only one of the many statistical sheets in this exhibit carries a manufacturer's factory price breakdown in a report of industry sales, and even here the figures are lumped together since there is no company sales or price breakdown. The same is true of Ex. Nos. 3004, 3024 and 3036, which are more of the same.⁷¹ The exhibits were clearly inadmissible as hearsay, and totally irrelevant to appellants' case.

71. In fact, Ex. No. 3004 shows that special precautions were taken by combining categories "in order to avoid possible disclosure of individual company business." (Ex. No. 3004, Form S-342, p. 4.)

One other exhibit (Pl. Ex. for Id. No. 431), referred to throughout Appellants' Opening Brief, should be mentioned at this juncture. This exhibit, attached as "Exhibit B" to appellants' brief, is a letter, over the rubber-stamped name of Judson Sayre of Norge Sales, apparently addressed to other Norge employees, and transmitting to them a memorandum that the letter says was handed out at a NEMA meeting. Neither the letter nor the memorandum ever was authenticated. There was never any showing of who was the author of the attached memorandum, or that it in fact had been received by Frigidaire or General Motors or by any of the other appellees. Moreover, contrary to appellants' assertion, the document doesn't show a meeting to discuss a nationwide retail price-system for appliances. The memorandum merely states the opinion of someone—never identified by appellants—that each manufacturer in establishing its own wholesale prices, should not give special discounts to large-volume retailers. The memorandum does not urge, or even hint, that members should charge the same price as their competitors. There is no mention at all of the question of retail prices to the consumer. Ex. No. 431 is totally irrelevant and inadmissible as hearsay.

(5) *Studies Prepared by Appellants.*—The only other excluded evidence offered by appellants against Frigidaire (among other appellees) comprises a series of studies undertaken by appellants' accountants,⁷² the bulk of which purportedly were based upon fragmentary documents obtained from the files of the alleged co-conspirator retailers. These exhibits were properly excluded on grounds of relevancy, hearsay, and lack of foundation.⁷³

The first set of these exhibits consisted of studies *purporting* to show that three of the five alleged retail co-conspirators often adopted suggested list prices as the prices to be tagged on the merchandise. See Pl. Ex. for Id. Nos. 1561-1578 (Broadway-Hale); 1579-1681 (Lachman Bros.); and 1560 (Redlick's). But on voir dire examination it quickly became apparent that these exhibits did

72. Most or all of the studies actually were not prepared by appellants' witness, Mr. Victor Honig, but by a member of his staff (Tr. 6365).

73. See Appellants' Opening Brief, pp. 166-167.

not show actual tag prices at all, were grossly inaccurate, hopelessly garbled and without any semblance either of relevancy or proper foundation. At the outset appellants' witness made it clear that there was no foundation for admissibility against Frigidaire⁷⁴ or any other appellees. None of the documents or information used in preparing the exhibits came from appellees' files or records; the witness had received certain documents from appellants' counsel, and apparently these were purchase invoices that counsel at some time had obtained from the retailers (Tr. 6373-6374). The witness did not know what the figures on the invoices actually meant, but acting on instructions from appellants' counsel he assumed that certain markup figures represented tag prices (Tr. 6386-6387; 6397). He had no idea what prices the retailers in fact had tagged on the merchandise, nor what the actual sales prices were (Tr. 6377; 6382-6383). The witness used various arbitrary limitations that he could not explain (Tr. 6384-6385) and could not even say whether any substantial share of the purchase invoices he used in his study related to the San Francisco area (Tr. 6380-6381).

The same deficiencies appeared in the second group of tabulations prepared by appellants' accountants, and offered in evidence by appellants. These were Pl. Ex. for Id. Nos. 4334, 4336 and 4340, purporting to show the dollar volume of purchases of the alleged retail co-conspirators from the distributor appellees and others, and Nos. 4335, 4337, 4339, 1491 and 1492, purporting to enumerate instances of cooperative advertising credits given to the retailers. This evidence was properly excluded on relevancy and hearsay grounds and lack of foundation.

Again it appeared that these exhibits had been tabulated from some documents furnished to the accountants by appellants' coun-

74. The only such exhibit purporting to relate to Frigidaire merchandise was Pl. Ex. for Id. No. 1572, which was based solely upon a single invoice apparently issued by Broadway-Hale during the year 1958 for the purchase of Frigidaire appliances (Tr. 6397). The witness could not explain why he took certain figures off the invoice for use in his "study" rather than other, different figures that appeared to be equally, or more, applicable (Tr. 6397-6398).

sel, who evidently had obtained them from the retailers (Tr. 6325-6326). The accountants apparently included intermingled data relating to stores outside of San Francisco in preparing the exhibits (Tr. 6334-6336; 6341-6342; 6353-6354; 6362). The retailers who were the subject of these studies had a number of stores located outside of San Francisco (Tr. 6334-6335; 6360-6361). The accountants made no effort to check the figures in the tabulations against the books and records of the retailers (Tr. 6334; 6343; 6350), and could not represent that the source documents used in making the tabulations were correct or even by any means complete (Tr. 6334; 6343; 6356-6357).

The final accounting exhibits offered by appellants, but excluded, were Pl. Ex. for Id. Nos. 1500 and 1500-1,⁷⁵ purporting to show Manfree's sales and profits during the years 1957-1964. There was no real exploration of the foundation or accuracy of these exhibits, for the court properly excluded them as irrelevant to the issue under consideration in the initial stage of the split trial: whether there had been a conspiracy (Tr. 5940; 6363).

Appellants now argue that these exhibits were relevant because they "showed the boycott's effect upon Manfree's business in relation to the brands of appellee and co-conspirator vendors, and was therefore further proof of their violation of the anti-trust laws." (Appellants' Opening Brief, p. 167.) Appellants proceed from this mind-boggling declaration to another: "Evidence of the impact of a conspiracy is relevant to the proof of the conspiracy itself."⁷⁶ (*Ibid.*) Appellants have not even attempted to demonstrate how Manfree's sales and profit figures would have had any bearing on the question of whether a conspiracy existed. Certainly such figures *would* have been pertinent to the

75. Actually, appellants appear confused as to the exact identification of the Manfree study. There was only one such study (Ex. No. 1500) marked at trial. "Ex. No. 1500-1" does not appear to have been offered.

76. Appellants cite *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), but that case stands for a contrary proposition—that under some circumstances *impact* can be inferred as causally related to an antitrust violation on account of the nature of a *proven* conspiracy—not that impact proves there was a conspiracy. 370 U.S. 690, 697.

issue of damages—had that issue ever been reached—and indeed would have opened up a lengthy and time-consuming inquiry into Manfree's financial affairs. It was precisely the purpose of the court's pretrial order separating the conspiracy and damage issues for trial, to avoid such an inquiry if (as was the case here) it was unnecessary.

B. OTHER EVIDENCE EXCLUDED.

Appellants also complain about the exclusion of certain other items of evidence which do not pertain to Frigidaire or General Motors, but instead relate to other appellees or to non-parties. No foundation for the admissibility of this evidence against Frigidaire or General Motors was ever laid by appellants.

Appellants did claim that some of this evidence should have been admitted against all the appellees as comprising the declarations of co-conspirators. However, since there was never any proof of a conspiracy, or that any of the appellees or any others were members of a conspiracy, nor any proof that the alleged declarations were made pursuant to or in furtherance of a conspiracy, that theory of admissibility does not apply.⁷⁷ *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 386 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *United States v. General Elec. Co.*, 82 F. Supp. 753, 872 (D.N.J. 1949). See also *Krulewitch v. United States*, 336 U.S. 440 (1949).

Despite the patent inapplicability of all of this excluded evidence to Frigidaire and General Motors, certain of the challenged evidence rulings are taken up in this Brief—simply on account of appellants' reliance on these rulings as establishing prejudicial error.^{77a}

(1) *Evidence of Affiliations of Local Retailers with the Better Business Bureau.*—Appellants claim error in the trial court's

77. Thus, a proper foundation must be laid as a prerequisite, despite the unrestricted discretion of the trial court in establishing the order of proof. *Esco Corp. v. United States*, 340 F.2d 1000, 1009 (9th Cir. 1965).

77a. To minimize the repetition of arguments in the briefs of other appellees, we have omitted discussion of evidence rulings challenged by appellants where such rulings related to evidence offered solely against other appellees now represented on this appeal.

exclusion of certain documents—actually a hodgepodge of irrelevancy and inadmissible hearsay—relating to the participation of the alleged co-conspirators in the San Francisco Better Business Bureau. The excluded items⁷⁸ were entirely from the files of Broadway-Hale, Lachman Bros. or Redlick's (Appellants' Opening Brief, pp. 157-158).

Appellants' theory appears to be that within the respectable confines of the Better Business Bureau, an invidious conspiracy was at work in which the alleged retail co-conspirators were acting to fix prices, boycott U.S.E., and keep U.S.E.'s advertising out of the newspapers. Much evidence pertaining to the Better Business Bureau in fact was admitted, and all it disclosed was that the retailers were members,⁷⁹ that misleading advertising was a subject of concern to the Better Business Bureau, and that some meetings had been held at which a code of proposed advertising standards was discussed. No connection of any sort was disclosed between Frigidaire or any other appellee and these Better Business Bureau activities. Frigidaire was not even a member of the Better Business Bureau.

The Better Business Bureau evidence that appellants' claim was erroneously excluded was even more irrelevant than the admitted evidence. An example is Pl. Ex. for Id. No. 453, which pertains to complaints by the Better Business Bureau that Broadway-Hale was utilizing deceptive advertising. Ex. No. 453 itself is a letter to the Better Business Bureau from Broadway-Hale in which Broadway-Hale promises to be more careful in its advertising claims in the future, and states in part:

"This points to the fact that we retailers must exert extreme care and take the necessary time to check out all statements, price comparatives, etc. This is not an easy task. However, we want you to know that we intend to do everything we can to prevent errors in our advertisements."

78. Pl. Ex. for Id. Nos. 453, 384, 390, 391, 393-A, 396-A, 400, 403 and 404.

79. U.S.E. itself was a member of the Better Business Bureau (Tr. 6054).

Appellants' misreading of this letter is symptomatic of their desperate and continual efforts to make something out of nothing. Appellants claim that the letter states "that all San Francisco retailers must *jointly* check out all 'comparative price' claims made in retail advertising. . . ." (Appellants' Specification of Errors, p. xlix.) (Emphasis added.)

Even as misconstrued by appellants, the other "Better Business Bureau" exhibits that were excluded amount to nothing. Some are minutes of Better Business Bureau meetings or notices of such meetings (Ex. Nos. 390, 391 and 400). One has nothing to do with the Better Business Bureau at all, but is merely a letter from Sterling Furniture to the R.C.A. distributor Meyer, expressing pleasure over a recent luncheon engagement (Ex. No. 403). Another is an expense voucher relating to a luncheon meeting between representatives of the Call Bulletin and representatives of Sterling Furniture, which was an advertiser in the Call Bulletin (Ex. No. 404).⁸⁰ Thus, the excluded "Better Business Bureau" evidence was nothing but a mass of irrelevant hearsay from the files of the retailers, unconnected to any appellee, and proving nothing as to anyone. It was properly excluded.

(2) *Evidence as to the San Francisco Call Bulletin.*—Appellants also predicate error on a ruling of the trial court striking a portion of the testimony of a former employee of the San Francisco Call Bulletin, Mr. Mittelman, who was also an employee of

80. Appellants argue, at p. 158 of their brief, that it can be inferred that something conspiratorial transpired at this Sterling Furniture-Call Bulletin luncheon meeting, but there was no evidence of this. The excluded exhibit in any event showed only that a meeting took place. No one disputed the fact of the meeting (Tr. 5694-5697); indeed, appellees stipulated that there was such a meeting. (*Ibid.*)

Appellants also argue that the inability of the witnesses to recall precisely what occurred at the meeting permits an inference in favor of appellants (Appellants' Opening Brief, p. 158). The authority cited for this proposition, *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 203 (9th Cir. 1963), doesn't support it at all. In *Girardi*, there had been a written admission by the witness, which, together with other facts, justified disbelief by the jury in the witness' testimony that he couldn't recall the facts alluded to in his letter. There was, of course, no evidence of any such written—or verbal—statements by any of the witnesses in this case.

U.S.E.⁸¹ Appellants attempted to solicit Mr. Mittelman's recollection of a conversation with *another Call Bulletin* advertising employee regarding discount store advertising. The testimony was properly barred on hearsay grounds, and as concerning declarations made by a representative of a party not named as a co-conspirator (Tr. 2123-2135). Appellants never contended that the *Call Bulletin* was a co-conspirator in this case. (*Ibid.*) Compare *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 386 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957), holding that statements *made even by a co-conspirator* are inadmissible against other alleged conspirators if no prima facie showing of a conspiracy has been made. *United States v. General Elec. Co.*, 82 F. Supp. 753, 872 (D.N.J. 1949). See also *Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522 (2d Cir. 1956).

(3) *Evidence as to the Klor's Lawsuit.*—Appellants complain that the court improperly excluded the testimony of a Mr. Sam Fractenberg (Appellants' Opening Brief, pp. 168-169). Some years previously Fractenberg had been an officer of Klor's Inc., a San Francisco retailer that itself had been plaintiff in an earlier treble-damage suit.⁸²

The trial court excluded the Fractenberg testimony (Tr. 5682-5684) because appellants had not listed Mr. Fractenberg or any other Klor's witness in their pretrial statement, although the court had specifically required the parties to identify their witnesses prior to trial.⁸³ (See appellants' pretrial list of witnesses at R. 1500.) Appellants gave no reason—and there was none—for

81. See Appellants' Opening Brief, pp. 158-159.

82. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In the cited decision, the Supreme Court reversed summary judgment for the defendants. Subsequently, when the case was remanded to the District Court, plaintiff Klor's dismissed all defendants except General Electric, went to trial against General Electric and the latter obtained a directed verdict at the close of plaintiff's evidence. The directed verdict was not appealed.

83. Local Court Rule 4(11) requires such a listing in a party's Pre-trial Statement.

their oversight in failing to name any Klor's representative in their pretrial witness list.⁸⁴

The purpose of requiring a pretrial listing of witnesses, of course, is to permit parties to prepare adequately for trial, to prepare to cross-examine, to assemble such documents or other factual information as may be pertinent and, if need be, to have witnesses available to rebut the anticipated testimony. It was particularly essential that such a procedure be followed in the present cases, involving as they did, dozens of witnesses and hundreds of documents. Other courts in similar situations have upheld "the need to maintain a system of orderly procedure for preparation and trial." *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657, 662 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964), where the court affirmed an order refusing to allow a witness to testify as to the *facts* of an accident where he had been identified only as an expert witness prior to trial. See also *Taggart v. Vermont Transp. Co.*, 32 F.R.D. 587 (E.D. Pa. 1963), *aff'd*, 325 F.2d 1002 (3d Cir. 1964).

However, the proposed testimony was of doubtful relevancy at best. Klor's Inc. had gone out of business before U.S.E. ever opened its doors (Tr. 5677). The tendered testimony would have pertained solely to events from June, 1955 to January, 1957 (Tr. 5668; 5681-5682). Further, a number of the appellees were not involved in the Klor's case at all (for example, Frigidaire and General Motors were not; see Tr. 5682).

84. During the trial appellants also sought to read the deposition of Mr. Klor taken in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, *supra*. This offer was properly rejected for a variety of reasons; among other things, the deposition had been taken in a different lawsuit in which the issues were different and many of the parties in the present suits had not been involved, and of course had had no opportunity to cross-examine (Tr. 1359-1360). And again appellants had not identified the deposition in their pretrial listing of evidence. Appellants state at p. 168 of their Opening Brief, that after appellants first broached their plans, during the trial itself, to introduce these witnesses, the court had "allowed appellants to call Mr. George Klor" as a live witness but that Klor was ill and could not appear. This is somewhat misleading; the court at no time ruled that it would permit Klor to testify but rather expressly reserved a ruling on this question until such time as appellants actually called him as a witness (Tr. 1359-1360). Klor himself was never called as a witness.

Testimony by a witness from a totally different case would have diverted the trial into an extended exploration of unrelated facts, all of which predated the relevant period in this case. As this Court observed in affirming the exclusion of similarly collateral evidence on relevancy grounds in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 670 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963):

“[A]n excursion into each of these incidental matters could and probably would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably.”

The testimony of Mr. Fractenberg was properly excluded.

(4) *Miscellaneous Evidence Points Raised by Appellants.*— Finally, appellants raise a variety of miscellaneous complaints about rulings on evidence. These are somewhat difficult to classify. In a number of instances it is not clear what appellants are complaining about even after careful study of their Opening Brief and Specification of Errors. None of appellants’ complaints—explained or unexplained—is meritorious.

(a) *Rejected Evidence as to Miscellaneous Purported Requests for Merchandise*

Appellants complain that the court erroneously rejected a minor amount of evidence as to appellants’ written or oral requests for merchandise, in particular a few requests directed to various non-defendants (Appellants’ Opening Brief, pp. 160-161). Objections were properly sustained to this evidence on grounds of irrelevancy, hearsay, lack of foundation or that it was cumulative. It would serve no purpose for us to describe each of these separate rulings; appellants themselves have not seen fit to do so. Appellants have failed to demonstrate how exclusion of this evidence in any way could have had any effect on the outcome of the trial.

For example, appellants complain about exclusion of Pl. Ex. for Id. Nos. 1759, 1760, 1761 and 1762, purporting to be correspondence between appellants and Motorola concerning Motorola television sets. Appellants neglected to introduce proof that the letters

in fact had been sent or received (Tr. 5977). Even had a foundation been laid, the letters were cumulative; there already was testimony that Manfree had attempted to purchase from Motorola (Tr. 5822-5823) and another of appellants' form letters requesting Motorola merchandise was admitted in evidence (Ex. No. 4201). Appellants complain that some other such letters—Ex. Nos. 1754 and 1756—were rejected (Specification of Errors, p. xiv) but in fact these exhibits were *received* in evidence (Tr. 5977).

The oral testimony that appellants' claim should not have been excluded was of a similarly trivial nature and was correctly excluded. For example, the testimony of one of appellants' witnesses, Mr. Boyd, was stricken concerning a conversation between him and Mr. Newby, a purported Westinghouse employee, where no foundation had been laid as to Newby's authority to speak for his company (Tr. 5624-5630).⁸⁵ *Flintkote Co. v. Lysfjord*, 246 F.2d 568, 584-585 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). But the stricken testimony was simply to the effect that Newby had said he had no authority to decide whether or not Westinghouse would sell to Manfree (Tr. 5554).

(b) *Miscellaneous Evidence as to Westinghouse*

Appellants argue that certain Westinghouse internal memoranda were improperly excluded and that this inhibited appellants' examination of Mr. Hangauer, a Westinghouse witness (Appellants' Opening Brief, p. 162). The exhibits referred to by appellants were Pl. Ex. for Id. Nos. 352 and 479-481. Appellants again are careless with the record. The bulk of Ex. No. 352 was read into the record (Tr. 6157). The other exhibits were excluded because they were inadmissible hearsay. They were simply a collection of field reports by Westinghouse salesmen containing a variety of opinions and rumors mostly without even a semblance of relevancy (Tr. 6151; 6483-6485). Mr. Hangauer, the Westinghouse witness, had no personal knowledge of the contents of the

85. The record showed that Newby became a Westinghouse District Sales Manager two years after the alleged conversation with Mr. Boyd (Tr. 5626).

reports. (*Ibid.*) The reports were correctly excluded as hearsay. *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 210, 218 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

Appellants suggest that the excluded Westinghouse evidence would have shown that Westinghouse thought it could not sell to discount houses and department stores at the same time (Appellants' Opening Brief, p. 162). However, Westinghouse in fact did sell—and continued to sell—to GET, a San Francisco discount house (Tr. 6169), as well as other discount stores (Tr. 6146) and to a variety of other retail stores, including department stores (Pl. Ex. Nos. 4207; 4218).

(c) *Supposed Rulings that Various Witnesses were not Hostile or Adverse*

Appellants argue that the court erroneously ruled that certain of the witnesses called by appellants who were former employees of appellees or alleged co-conspirators were not adverse or hostile (Appellants' Opening Brief, pp. 170-171). Neither in their brief nor in their Specification of Errors do appellants demonstrate what it is they really are complaining about, what the rulings really were or that appellants were prejudiced in any way by the rulings. This is yet another instance in which appellants imply that the record contains things that in fact are not there. As an example, appellants complain, at p. 170 of their Opening Brief, that the trial court erroneously held that the testimony of a Mr. Sanford would not "bind" Broadway-Hale. Sanford left the employ of Broadway-Hale in 1959 (Tr. 504), some six years prior to trial. Appellants' counsel had Sanford on the stand for several days, cross-examined him, used leading questions and numerous times was allowed to attempt to impeach him. The Sanford testimony, of course, was not considered by the trial court to be "binding" on appellants, in ruling on the motions for directed verdict. Indeed, all that it comes down to is that a request by appellants' counsel at the beginning of the examination for a ruling that Sanford was a hostile witness was denied by the court because foundation for such a ruling had not by that time been established (Tr. 519-520).

(d) *Supposed Limitations on Cross-Examination or Redirect Examination*

Appellants make the charge that they were not permitted to impeach or fully cross-examine some of the witnesses or to rehabilitate their own witnesses (Appellants' Opening Brief, pp. 171-172). Again, appellants complain about something but do not discharge their obligation to this Court to explain what it is they are complaining about. The only specific example they discuss in their Opening Brief⁸⁶ is a trivial instance in which the court sustained objections to some questions that appellants asked their own witness, Mr. Freeman, concerning whether the misleading "bait and switch" advertising utilized by U.S.E. on occasion had also been used by some other retailers (Tr. 6056-6057).⁸⁷ Appellants never explained how it would have been relevant to show that while U.S.E. used misleading advertising, this was somehow excused because of similar conduct of some other retailers.

VI. The Trial Court Taxed Costs in a Proper Manner.

The final point of appellants' appeal centers around the taxation of costs by the trial court⁸⁸ (R. 1977-1979). After a lengthy hearing (Tr. 6919-7029), the trial court halved the cost bills filed by the appellees and Broadway-Hale, and taxed costs in the amount of \$22,088.69.⁸⁹

86. At pp. li-iii of their Specification of Errors, appellants cite transcript references supposedly showing some other instances but do not describe these instances. Presumably, appellants would put the burden on appellees and this Court to review the record and figure out what appellants' argument is.

87. Appellants also produced an exhibit consisting of two Los Angeles newspaper advertisements, which the court excluded (Pl. Ex. for Id. No. 5111; Tr. 6056-6057).

88. Execution of costs taxed on the judgment was ordered stayed pending this appeal (R. 2062).

89. The bill of costs of General Motors and Frigidaire had sought the sum of \$9,455.69 (R. 2003). These appellees were allowed costs of \$5,520.79 (R. 1979). Costs in the aggregate of \$45,054.52 had been claimed by the appellees and Broadway-Hale.

Appellants object now to four general categories of allowable expenses⁹⁰ which were prorated among the appellees and Broadway-Hale.⁹¹

(1) *Trial Transcripts*.—The first of these categories comprises the costs of two copies of trial transcripts prepared on a daily basis. This was proper since there were ten defendants at the trial. The trial extended over a ten-week period. Numerous witnesses were called to testify. Almost 7,000 pages of trial transcript were generated by appellants.

The criteria for the allowance of trial transcript costs have been codified in part. See 28 U.S.C. § 1920(2) (1964).⁹² Courts—including this Court—have added considerable gloss to this statute. It is now fairly clear that a district court may, in its discretion, tax the costs of copies of trial transcripts for the prevailing party. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 677-678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), where the case—also involving charges of a group boycott—had been involved and complex.⁹³ This Court noted there the need of counsel for a complete, accurate, and readily available record of the trial and pre-trial proceedings. In *Twentieth*

90. They also object to certain travel expenses of an officer of R.C.A., Mr. Saxon, incurred by R.C.A. in connection with his deposition (Tr. 6979-6985). This expense was authorized under 28 U.S.C. § 1920(3) (1964). The United States Supreme Court in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964), declined to adopt the position advanced here by appellants which would preclude a federal district court from ever taxing as costs expenses for transporting witnesses more than 100 miles.

91. That is, nine of the appellees. Norge Sales, dismissed previously on summary judgment, had allowable costs of only \$20.

92. U.S.C. § 1920(2) reads in part:

"A judge or clerk of any court of the United States may tax as costs the following:

* * * * *

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case"

93. There were several defendants in that case, too. Numerous pre-trial hearings were held over a period of nearly four years, and the trial extended over a period of approximately six weeks.

Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964), this Court expressly allowed the costs of a second copy of a trial transcript for use of counsel.⁹⁴ See also *Bank of America v. Loew's Int'l Corp.*, 163 F. Supp. 924 (S.D. N.Y. 1958); *Perlman v. Feldmann*, 116 F. Supp. 102, 109 (D. Conn. 1953). Certainly under the circumstances of this case, procurement of two trial transcripts for the ten defendants was reasonably necessary—indeed essential—for the expeditious conduct of the trial.

(2) *Costs of Depositions*.—Appellants also challenge the allowance by the trial court of the cost of one copy of certain depositions taken by appellants and appellees. The trial court reviewed the expenses of each deposition listed by each of the appellees, one by one, and actually disallowed a considerable number of these expenses⁹⁵ (see, *e.g.*, Tr. 6944). The trial court adopted the correct standards in determining which deposition expenses to allow: (a) depositions used at trial as direct testimony or for potential impeachment of witnesses (see, *e.g.*, Tr. 6952-6955), or (b) depositions which had been taken of officers of parties in this case (Tr. 7005-7006). Only one copy of each such deposition was allowed (Tr. 6941; 7006).

In *Independent Iron Works, supra*, 322 F.2d at 678-679, this Court allowed, as a taxable cost, the expense of depositions taken by defendants which had been used in part for impeachment purposes. This was held a sufficient basis to justify the item as an allowable cost. In addition, all depositions taken of officers and employees of the opposing party were allowed, under the rationale of *Hancock v. Albee*, 11 F.R.D. 139 (D. Conn. 1951).⁹⁶

94. Appellants' counsel had unsuccessfully opposed the costs of additional trial transcripts in that case, too.

95. All of the disallowed depositions had been designated by appellants in their Pre-Trial Statement, intended for use at trial, but were never used (Tr. 6956).

96. The court there reasoned that the possibility that a deposition would be used to impeach the party created a reasonable necessity for ordering a copy of the transcript to hold the impeachment within proper limits.

The trial court allowed appellees the cost of but a single transcript of depositions. This cost should be allowed:

"[W]hen a deposition is taken within the proper bounds of discovery as delineated by the Federal Rules, *at least one transcript thereof . . . will normally be found to be necessarily obtained for use in the case, whether or not the deposition is actually offered or used in the trial.*" *Perlman v. Feldmann*, 116 F. Supp. 102, 110 (D. Conn. 1953).

The trial court acted correctly.⁹⁷

(3) *Cost of Pre-Trial Transcripts.*—Another category of taxable costs that is a subject of this appeal consists of copies of transcripts of various pre-trial hearings. There was ample support for allowing such costs, particularly, as in the present cases, "where the pre-trial proceedings devoted considerable efforts to the limiting and clarifying of issues, were conducted at considerable length and where a proper understanding of the matters covered and preparation of a pre-trial order could not properly be had without a transcript thereof." *Bank of America v. Loew's Int'l Corp.*, 163 F. Supp. 924, 931-932 (S.D.N.Y. 1958). See also *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Brookside Theatre Corp. v. Twentieth-Century Fox Film Corp.*, 11 F.R.D. 259, 266 (W.D. Mo. 1951), *aff'd*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

(4) *Reproduction of Exhibits.*—The final item of cost attacked by appellants consists of the expense of one copy of all of their exhibits. (See, e.g., Tr. 6965-6971.) These costs were reasonably incurred in view of the documentary complexion of appellants' case. The documents were not otherwise readily available to appel-

97. Perhaps recognizing the compelling precedent of the rule promulgated in *Perlman v. Feldmann*, appellants urge that depositions of representatives of alleged co-conspirators, not parties to the case, should have been excluded. This proposition is given no authority. Certainly, appellees could not have been expected to disregard testimony of representatives of alleged co-conspirators. Most of the alleged retail and distributor co-conspirators were not parties at the trial, yet appellants attempted to implicate all in the imagined boycott.

lees for use at trial. *Twentieth Century Fox Film Corp. v. Goldwyn, supra*, 328 F.2d at 224. The ruling was correct.

CONCLUSION

For the foregoing reasons, this Court is requested to affirm the judgment of the District Court in all respects as to appellees General Motors Corporation and Frigidaire Sales Corporation.

Dated: April 30, 1968, at San Francisco, California.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation; NORGE SALES CORPORATION, an Indiana corporation,

Appellees.

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On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEE WHIRLPOOL CORPORATION

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20770

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation; BORG-WARNER CORPORATION, an Illinois corporation; CALIFORNIA ELECTRIC SUPPLY COMPANY, a California corporation; RADIO CORPORATION OF AMERICA, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; MAYTAG COMPANY, a Delaware corporation; MAYTAG WEST COAST COMPANY, a California corporation; GENERAL MOTORS CORPORATION, a Delaware corporation; FRIGIDAIRE SALES CORPORATION, a Delaware corporation; NORGE SALES CORPORATION, an Indiana corporation,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEE WHIRLPOOL CORPORATION

PROCEEDINGS BELOW

Appellants, United Shoppers Exclusive (hereinafter sometimes referred to as U.S.E.) and Manfree, Inc. filed

two complaints against five retailers and eight distributors in San Francisco and ten manufacturers of TV sets and major household appliances charging a conspiracy to boycott in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §15 and 16. The complaints are practically identical, one covering the period from May 1957 to August 1960 and the other from August 1960 to August 1964.¹ The cases were consolidated for trial and the basic liability questions were delineated in the pretrial order as follows:

“Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such conspiracy prevent plaintiffs from obtaining television sets and major household appliances?”

¹ Retailers charged as conspirators in the first complaint were Broadway-Hale Stores, Inc., Lachman Bros., R. H. Macy Co., Redlick-Newman Co., Sterling Furniture; distributors were H. R. Basford Co., California Electric Supply Co., Frank L. Edwards Co., Frigidaire Sales Corporation, Graybar Electric Co., W. J. Lancaster Co., Maytag West Coast Co., Leo J. Meyberg Co., Westinghouse Electric Supply Co.; manufacturers were Borg-Warner Corporation, General Motors Corporation, General Electric Co., Maytag Co., Motorola Corporation, Radio Corporation of America, Sylvania Electric Products Inc., Westinghouse Electric Corporation, Whirlpool Corporation, Zenith Radio Corporation. The second complaint, substantially similar to the first, added the following distributors and manufacturers, Callectron, Norge Sales Corporation and Zenith Sales Corporation and dropped Westinghouse Electric Supply Co., Sylvania Electric Products Inc. and Frank L. Edwards Co.

References herein will be the same as those used by appellants. Thus reference to the Clerk's Transcript of Record will be "R.", and the Transcript of the trial proceedings "Tr." Transcripts of the pretrial hearings are referred to as "P. Tr."

“Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco, and pursuant to such conspiracy prevent plaintiffs from obtaining television sets and major household appliances?” (R. 1608-1609, Pre-Trial Order, Aug. 13, 1965)

The court ordered that the issue of liability be tried first and that the issue of damages then be tried before the same jury. (R. 1608-1609, Pre-Trial Order Aug. 13, 1965) At the conclusion of the appellants' case on the question of liability all defendant-appellees moved for directed verdicts. Their motions were granted.

STATEMENT OF FACTS

Appellants' statement of facts is incomplete, confusing and in part a distortion of the record. Accordingly, Appellee Whirlpool submits the following statement of uncontroverted facts:

At all times material to this litigation Whirlpool was a manufacturer of major household appliances (commonly referred to as white goods) bearing the brand “RCA-Whirlpool”.² Both prior and subsequent to the creation of plaintiff corporations, Whirlpool sold these products *only* to independent distributors with title and risk of loss passing to the distributors at the point of shipment. (Exhibit 1933D-F) The distributor had the responsibility to “select, develop, train and maintain” a dealer organization. (Exhibits 101, 102 and 103).

Whirlpool's distributor for all of Northern California was Leo J. Meyberg Co. (later known as A. H. Meyer Co.) which was succeeded in mid-1964 by Calctron (Tr.

² Use of the mark “RCA” was authorized by its owner-appellant Radio Corporation of America. (Exhibit 12155)

5043). (This distributorship will hereinafter be referred to as "Meyer"). Meyer sold Whirlpool products to retail dealers of its choice (Tr. 1298, 5014, 5124, 5128) and Whirlpool has never interfered with its selection or designated to whom Meyer should or should not sell (Tr. 5031). While under its agreement with its distributors Whirlpool reserved the right to sell RCA Whirlpool brand products to others, it has never exercised that right (Tr. 5031).

Appellant Manfree is a concessionaire and lessee of appellant U.S.E., a so-called discount house in San Francisco. Until September, 1961 only members who paid a fee of \$2.00 were admitted to the store. Thereafter it was open to the public generally. Manfree came into existence in May, 1957 following the failure of the prior concessionaire of television sets and major household appliances. During all or most of Manfree's existence, it handled white goods manufactured by Admiral, Gaffers & Sattler and Easy and TV sets manufactured by Admiral, Emerson and Olympic. During part of the period it handled white goods manufactured by Philco, Maytag, Hotpoint and Borg-Warner (Norge) and TV sets manufactured by Zenith.³

At no time did any representative of Whirlpool visit the premises of U.S.E. nor was it aware of the lines carried by or denied to Manfree, or when denied, the reasons for such denial.

Whirlpool first learned of appellant Manfree six weeks before it was sued. It received a letter dated June 24,

³ These goods were handled during the following periods: Philco, May 1957-September 1958; Maytag January 1958-April 1959; Hotpoint, May 1957-October 1958; Borg-Warner, May 1957-September 1957.

1960 in which Manfree requested that Whirlpool submit carload prices and authorization to carry its line. (Ex. 1710). A similar letter dated July 25, 1960 (Ex. 1715) was also received by Whirlpool. These were referred by Whirlpool to its distributor Meyer and Manfree was notified to contact Meyer. (Ex. 1711, 1718 and 1721). The evidence reveals that Manfree was previously aware that Meyer was the distributor of RCA-Whirlpool products and had contacted Meyer. (Ex. 1703, 1704, 1705, 1706). During the pendency of this litigation Manfree wrote additional letters to Whirlpool requesting its line. (Ex. 1716 and 1722). Whirlpool again responded to the letters by advising Manfree that its distributor in the area was Meyer Company (as appellants well knew), that Manfree's letters were being referred to Meyer and suggesting that the request to handle its line should be discussed with that company. (Ex. 1711, 1718 and 1721). What transpired between Meyer and Manfree was never reported to Whirlpool. (Tr. 1293, 1295, 5013, 5014). Except for the letters referred to above, Whirlpool had no contact with either appellant.

In 1957 Whirlpool, which up to that time was a manufacturer only of laundry equipment, expanded its products to include a full line of white goods consisting of ranges, freezers, dishwashers and refrigerators in addition to laundry equipment. It then embarked upon a nationwide advertising campaign to promote the sale of these new products. (Tr. 5162). As part of this program Whirlpool matched funds with distributors to be used to advertise and promote RCA-Whirlpool brand merchandise in the local markets throughout the country. (Tr. 5162, 5163). Such funds were made available by Whirlpool only to its distributors. (Tr. 5061, 5065). The distributor, at its option, could use these funds to run dealer

listing type of advertisements,⁴ could make them available to retail dealers as part of its own cooperative advertising programs, or could use them for advertising under the names of dealers or for in-store promotion by dealers selected exclusively by the distributors. (Tr. 579-580, 5028, 5031, 5062, 5066-5083, 5088, 5090, 5099, 5124-26 Ex. 5085).

As part of this program Whirlpool also ran fully-paid factory ads in the Sunday supplements of newspapers throughout the country. (Tr. 5176).

During the period prior to July 1961 Whirlpool's price lists to its distributors contained suggested retail prices on some, but not all of the items listed. These suggested retail prices were not a part of Meyer's pricing structure. (Tr. 649). Meyer issued its own price lists to its dealers. (Tr. 641-643). They contained Meyer's suggested retail prices. A hand-picked study introduced in evidence by appellants disclosed that in approximately 40% of the instances considered the suggested retail price of Meyer differed from that of Whirlpool. (Ex. 5115). Beginning July, 1961, Whirlpool suggested no retail prices whatsoever. (Ex. 1934, 1935).

The advertising policy of Meyer was to make funds available to dealers only if they advertised at Meyer's suggested retail price or showed no price at all. (Tr. 603, Ex. 1161). Whirlpool did not know of this policy. (Tr. 5028). Nor was it aware of the advertising policies or practices of the alleged co-conspirators.

The prices at which Whirlpool products were sold by dealers were "all over the lot" (Tr. 5029) and according to Manfree's own manager the biggest price-

⁴ An advertisement of Whirlpool products over the names of several dealers.

cutter of all was the alleged co-conspirator, Hale, who during the period of the alleged conspiracy closed its San Francisco major appliance stores. (Tr. 5648).

Not only did Whirlpool sell its products and make cooperative advertising funds available only to Meyer, but its contacts with dealers were minimal. Except for the showing of its new lines, to which dealers were invited, the record discloses only two meetings between a Whirlpool representative and representatives of any retailer. One was a social meeting, the other occurred in November, 1958, a year and a half before Whirlpool even heard of appellants (Tr. 1501 and 576-579) at which time, when the question of price arose, Whirlpool advised the dealer that pricing was the responsibility of the distributor and that it would not discuss the subject. (Tr. 587).

Whirlpool was not a member of nor did it attend any meetings of the Better Business Bureau, Northern California Electric Bureau, Retail Furniture Association or any other local organizations referred to in the evidence. Nor did any Whirlpool representative meet with any representative of the distributors of any other brand product or the local newspapers. Neither Manfree nor U.S.E. was ever discussed by or in the presence of any Whirlpool representative nor were they, or either of them, the subject of any correspondence received or sent by Whirlpool.

During the period in question, Whirlpool was a member of the National Electric Manufacturers Association (N.E.M.A.) and American Home Laundry Manufacturers Association (A.H.L.M.A.). As part of N.E.M.A.'s market research program each member reported to N.E.M.A. the number of units of each product sold to

dealers in each county and state. Since Whirlpool did not sell to dealers and its distributors covered more than one County (it had only one for all of Northern California), it secured this information from its distributors and reported it to N.E.M.A. No information as to purchases by individual dealers was listed in Whirlpool's reports to N.E.M.A. (Tr. 5176-77). The Association reported back to the manufacturers the total industry sales by county and state, and then, the factory from its own records determined its degree of market penetration in each county and state. (Tr. 5038).

Mr. Walker, the Whirlpool Regional Sales Manager for the area from Alaska to the Mexican Border and from Denver to and including Hawaii, also utilized the information furnished Whirlpool by its distributors to compile for them marketing information. Thus in 1966 he prepared for each of the distributors in this region a list of dealers by county who, in the smaller market areas, purchased 25, or in the larger market areas, purchased 50 units of a given product in any of the years listed, 1960-1966. Such an account was described as a key account and the purpose of the listing was to assist the distributor in determining the trend of each of its dealer's sales. (Tr. 5043, 5044, Ex. 5081).

SUMMARY OF ARGUMENT

The gravamen of appellants' complaint is a charge that Whirlpool and others conspired to boycott Manfree and thus deny it TV sets and major household appliances. At the close of appellants' evidence the trial Court directed a verdict.

Appellants concede that they offered no direct evidence of conspiracy and the record is void of any evidence

from which conspiracy can be inferred. With respect to Whirlpool the evidence affirmatively established that Whirlpool did not sell appellants just as it did not sell any other dealer in the San Francisco area because it was not in the business of selling dealers; that its products were sold to and distributed solely by an independent local distributor; that Whirlpool did not interfere with or concern itself about that distributor's selection of customers; that it was unaware of the brands of merchandise handled by or denied to Manfree and where these brands were denied Manfree, Whirlpool was unaware of the reason for such denial. Appellants failed to prove a *prima facie* case and hence the action of the trial court in directing a verdict was patently proper.

The orders and rulings of the Court with respect to discovery, separation of issues for trial and the receipt and rejection of evidence concerning which appellants complaint were clearly proper and in any event harmless.

ARGUMENT

THE EVIDENCE AND ALL INFERENCES REASONABLY TO BE DRAWN THEREFROM DOES NOT ESTABLISH A PRIMA FACIE CASE OF CONSPIRACY ON THE PART OF WHIRLPOOL AND THE COURT, THEREFORE, CORRECTLY DIRECTED A VERDICT.

Appellants contend that five department stores in San Francisco were the nucleus of a great conspiracy participated in by numerous distributors and manufacturers of TV sets and major household appliances as well as the morning newspapers of San Francisco, and that the object of the conspiracy was to boycott them "because . . . appellants were a discount store operation which threatened the San Francisco retail market controlled by appellees and their co-conspirators." (App. Br. p. 86).

Appellants offered no direct proof of conspiracy. Rather, they rely upon circumstantial evidence. But all the evidence, voluminous as it is, viewed in a light most favorable to appellants raises no inference of conspiracy on the part of Whirlpool, and therefore the trial court correctly directed a verdict in its favor.⁵

The test to be and that which was applied by the trial court in taking this case from the jury is well settled in law and was laid down in this Circuit in *Independent Iron Works, Inc. v. United States Steel Corporation*, 177 F. Supp. 743, 746 (N.D. Cal. 1959), aff'd. 322 F. 2d 656 (9th Cir. 1963), cert. den'd. 375 U.S. 922 (1963):

"On these motions [for directed verdicts] plaintiff is entitled to and must receive the benefit of all

⁵ In Whirlpool's view appellants failed to prove conspiracy on the part of any appellee.

favorable inferences which can be drawn from the evidence. *The plaintiff, however, still has the burden of establishing a prima facie case.* He must rely upon reasonable and logical inferences from the evidence in the record. *The plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.* *Wolfe v. National Lead Company*, 9th Cir. 1955, 225 F. 2d 427, 433-434." (emphasis supplied).

Forced and violent inferences may not be drawn. *Galloway v. United States*, 319 U.S. 372, 395 (1943) and "mere speculation must not be allowed to take the place of probative facts". *Safeway Stores v. Fannan*, 308 F. 2d 94, 97 (9th Cir. 1962).

While a conspiracy may be shown by circumstantial evidence,

"... the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as to merely create a suspicion." (*Johnson v. J. H. Yost Lumber Co.*, 117 F. 2d 53, 61 8th Cir. 1941).

Whirlpool, in the exercise of its business judgment, long before either appellant came into existence, determined not to sell directly to retail dealers in Northern California, but to sell only to an independent distributor, Meyer. There is no question that Whirlpool did not deviate from that policy when it received inquiries from Manfree and that it did not sell Manfree, just as it did not sell any other retail dealer in Northern California, discount house or otherwise. (Tr. 5031). But Whirlpool's refusal to change its method of distribution simply because it received an inquiry from Manfree is not a fact from which an inference of conspiracy can be drawn. It is firmly established in law that absent illegal agree-

ment one may select its own customers. *United States v. Colgate*, 250 U. S. 300 (1919).

“From the mere fact of refusing to sell to plaintiff, there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers. *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 2 Cir. 227 F. 46; *Union Pacific Coke Co. v. United States*, 8 Cir., 173 F. 737; *United States v. Colgate & Co.*, 250 U.S. 300, . . .” (*Johnson v. J. H. Yost Lumber Co.*, 117 F. 2d 53, 61, 8th Cir. 1941, *Amplex of Maryland Inc. v. Outboard Marine Corp.*, 380 F. 2d 112, 4th Cir. 1967).

This is true in those cases where the seller normally and customarily sells to the class of trade of which the refused prospective customer is a member. It would seem unnecessary to argue that a manufacturer may legally determine, as did Whirlpool, to sell its product only to its distributor. In the absence of an illegal agreement one “may sell or refuse to sell to a customer for good cause or for no cause whatsoever”. *Flinkote Co. v. Lysfjord*, 246 F. 2d 368-376 (9th Cir. 1957). Appellants do not, as indeed they cannot, deny that Whirlpool had good cause to refuse to sell Manfree; that it was Whirlpool’s long-established policy to sell only to one distributor in Northern California and that it had never deviated from that policy. Instead they argue (page 99 of appellants’ brief) that in the agreement appointing Meyer its distributor it reserved the right to sell others. But that is beside the point. The fact remains it has never exercised that right and has at all times acted in complete conformity with its long-established policy of selling only to the distributor.

Groping desperately for some reed to grasp in an attempt to attach an iota of respectability to their com-

pletely untenable claim that the refusal of Whirlpool to sell Manfree has significance, appellants, at page 100 of their brief state that “Whirlpool sold its ‘Coldspot’ and ‘Kenmore’ brands of appliances directly to Sears, Roebuck and Co. which maintained retail stores in the market area (Tr. 5051-5052)”, thus neatly ignoring the fact that the line of product involved in this case is the RCA-Whirlpool line and not private brands manufactured by Whirlpool for others.

Having taken over two years to write their 200-page brief, it is difficult to perceive that in their long and meticulous search of the record, appellants’ attorneys did not notice, even if their memory of what occurred at the trial had failed them, that the testimony to which they refer this Court does not relate to the brand of products in question and had been stricken from the record. (Tr. 5052).⁶

Nor does the fact that Whirlpool refused to sell Manfree give rise to an inference of conspiracy because its refusal allegedly paralleled the refusal of other manufacturers and distributors who likewise refused to deal, or having dealt with, refused to continue their relationship with Manfree. The record is completely void of proof that Whirlpool ever had knowledge of the actions of others much less that it acted pursuant to a common commitment, and, it is axiomatic that one cannot be a party to a conspiracy of which he has no knowledge. Thus, in *United States v. Standard Oil Company*, 316 F. 2d 884 (7th Cir. 1963), the court said:

⁶ Since this evidence was stricken it became unnecessary for Whirlpool to prove that which is a matter of public record. Kenmore and Coldspot trade names are owned by Sears, and Whirlpool had no right to sell such products.

“The substantive law of trade conspiracies require some consciousness of commitment to a common scheme. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al.*, 346 U.S. 537, 540-541. It has been stated there is no such thing as an ‘unwitting conspirator’. *United States v. National Malleable & Steel Castings Co.*, N.D.Ohio 1957 CCH Trade Cases Par. 68890, at p. 73601. Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act.” (p. 890).

On remand, the trial court in Standard Oil instructed the jury on the issue of conspiracy as follows:

“ . . . The gist of the offense of conspiracy is an agreement among the conspirators to commit an offense. No conspiracy in violation of the Sherman Act occurs unless it is established beyond a reasonable doubt that there is a *conscious commitment to a common scheme*. Unless the persons involved understand from something that was said or done that they were committed, there can be no conspiracy, and, hence, no violation of the Sherman Act.” . . . (Emphasis added) (N.D.Ind. 1964 p. 427, 432-433; American Bar Association, Jury Instructions In Criminal Anti-Trust Cases, p. 412, 432, 1965).

See also *United States v. Falcone*, 311 U.S. 205, 210 (1940); *Johnson v. J. H. Yost Lumber Co.*, 117 F. 2d 53 (8th Cir. 1941).

If there is one thing clear from the record in this case it is Whirlpool's complete lack of knowledge concerning Manfree, the latter's relationship with the alleged co-conspirators and the actions generally of those alleged co-conspirators. All that Whirlpool knew about Manfree is that it received letters from that company seeking to buy its line and that in keeping with Whirlpool's

policy not to sell dealers it referred those letters to Meyer. Whirlpool's representatives never visited U.S.E. nor did they discuss appellants with Meyer after referring Manfree's letters to it. Whirlpool simply did not concern itself with Meyer's selection of dealers. That was Meyer's responsibility. (Ex. 101, 102 and 103).

By virtue of a report of sales to dealers made to it by its distributor Whirlpool could have ascertained that Manfree, like many other dealers in San Francisco, did not purchase RCA-Whirlpool brand products. But this fact without more, and there is no more in the record, lacks signifiante. There are literally a dozen reasons why Meyer might have decided not to sell Manfree and an equal number of reasons why Manfree might have decided not to buy from Meyer after the letters sent to Whirlpool were referred to the distributor. It is uncontroverted that the refusal by Meyer to sell Manfree was not discussed with Whirlpool. (Tr. 1293, 1295, 5013, 5014).⁷

And the fact that a distributor refuses to sell a dealer does not give rise to an inference of a conspiracy between the manufacturer and the distributor. Thus, in *Brosius v.*

⁷ Contrary to appellants' brief (p. 68) stating that Mr. Sanford of Meyer testified that he believed Meyer could not sell to Manfree because of the downtown stores, Sanford's testimony shows no such belief. The citation in appellants' brief (p. 68) refers to the following question, "You had the belief, did you not, that in order to have your downtown stores handle the Whirlpool Corporation (sic) that you would not be able to sell to discount stores? The unequivocal answer was, "I did not." (Tr. 1288-1289).

The evidence disclosed that the reason given for Meyer's refusal to sell to plaintiffs was that Meyer simply was not interested in adding a dealer at the time of Manfree's request. (Tr. 4992-4993, 5893-5894).

Pepsi Cola, 155 F. 2d 99 (3rd Cir. 1946), the Pepsi Cola Company and Cloverdale Spring Company entered into a contract whereby the latter was appointed exclusive distributor for the trademarked soft drink called "Pepsi Cola". For a period of about six years the distributor sold Pepsi Cola to the plaintiff who resold and distributed the product in a designated territory. A controversy arose between plaintiff and the distributor, in consequence of which the distributor refused to continue supplying Pepsi Cola to the plaintiff, whereupon the plaintiff took the matter up directly with the officers of Pepsi Cola Company without result. He then brought suit claiming that Pepsi Cola Company and its distributor were conspiring in violation of the antitrust laws. Commenting upon this phase of the case when affirming judgment for defendants, the Appellate Court stated:

"Brosius, upon meeting with the situation described, appealed to officers of Pepsi Cola Company, and he contends that the treatment accorded him, together with the contract and the refusal of Cloverdale to sell to him, proves the conspiracy alleged.

"We are unable to make anything more out of the interviews with Pepsi Cola officials than they do not interest themselves with the distributor's business so long as he adheres to the contract and the volume of business is regarded by them as satisfactory. Such a policy is not unusual and is simply good business in a competitive economy." (p. 102)

There is no evidence that either Manfree or U.S.E. was discussed by or in the presence of any Whirlpool representative with any other manufacturer, distributor, dealer or newspaper or any other person or that Whirlpool ever knew what brands were handled by or denied to Manfree and when denied, the reason for

such denial. There is no evidence that U.S.E. or Manfree were the subject matter of or mentioned in any correspondence received by or sent by Whirlpool or in any of its inter-office communications.

Nor did Whirlpool involve itself with the local market, as appellees by distorting the record, argue. The record is clear that Whirlpool dealt only with Meyer and that its representatives visited retailers only when so requested by Meyer (Tr. 5061). It did not, as appellants assert at pages 83 and 99 of their brief have numerous meetings or constant communications with Hale or other retailers in San Francisco. As a matter of fact the very citations and exhibits to which appellants brazenly refer this Court as support for these assertions do not disclose even one meeting or one communication between Whirlpool and any retailer in San Francisco. This testimony and these exhibits actually refute appellants' assertions and highlight their distorted presentation of the facts. Thus, for example, Mr. Walker testified at page 5060 that he did not know if any Whirlpool representative ever visited any retailer in San Francisco. At pages 5053 and 5054 he did not testify to any visits to retailers, but rather that he compiled a report of retailers' trend of sales on the basis of information furnished Whirlpool by Meyer.

In fact the entire record discloses that except for the showing of its new lines, to which dealers were invited, only two meetings were held between a Whirlpool representative and representatives of any retailer in the San Francisco area. One of these was a social meeting (Tr. 1501), the other occurred in November, 1958, a year and a half before Whirlpool ever heard of appellants. (Tr. 576-579)

This is the state of the record from which appellants argue that a jury should have been permitted to infer

that Whirlpool knew of and was a party to an alleged conspiracy. Here the record not only discloses that Whirlpool, in refusing to sell Manfree, acted unilaterally in conformity with its long-established policy to sell only to independent distributors and not to dealers, but it also uncontrovertably discloses that Whirlpool so acted completely unaware that some others were likewise refusing to sell Manfree. Thus, the proof in this case does not even reach the level of conscious parallelism much less does it disclose that Whirlpool was invited to, joined in or was a party to any conspiracy.

Hence, appellants have failed to prove the most basic prerequisite of their claim of conscious parallelism and conspiracy against Whirlpool. They totally failed to prove that Whirlpool had knowledge of those facts which they claim give rise to an inference of conspiracy.

Moreover, assuming *arguendo* that Whirlpool knew that others also refused to sell Manfree, such fact standing alone would at best show no more than conscious parallelism. But conscious parallelism cannot be equated with conspiracy; and the Sherman Act proscribes conspiracy, not conscious parallelism. Cases to this effect are legion.

In *Theatre Enterprises, Inc. v. Paramount Distributing Corporation*, 346 U.S. 537 (1954), the Supreme Court of the United States stated:

“... this Court has never held that proof of parallel business behavior conclusively establishes agreement, or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.” (p. 541)

And this Court in affirming a directed verdict in *Independent Iron Works v. United States Steel Corp.*, 322 F. 2d 656, 661 (9th Cir. 1963) said:

“The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner *does not support an inference* of conspiracy, even though each knew that the business behavior of another or the others was similar to its own.” (Emphasis supplied)

And previously in *Chorak v. R.K.O. Radio Pictures*, 196 F. 2d 229 (9th Cir. 1952), *cert. denied* 344 U.S. 887 (1952), *reh. den'd.* 344 U.S. 910 (1952), this Court, quoting Mr. Justice Hand, said:

“At best an inference of conspiracy would only arise [from similar business conduct] if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed.”

The decisions of other circuits are to the same effect. In *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 324 F. 2d 652, 653 (1st Cir. 1963), the court sustained a directed verdict for defendants stating:

“The plaintiff must introduce evidence from which the jury could reasonably infer concert of action. *We have never recognized conscious parallelism, standing alone, as sufficient to sustain such a finding.*” (Emphasis supplied)

In *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F. 2d 910, 911 (1st Cir. 1964) the Court clearly enunciated the requirement that some meaningful factors must be proved in addition to proof of conscious parallelism before a case is submissible to a jury. The Court said:

“However, conscious parallelism is concededly not enough. *Brown v. Western Massachusetts Theatres, Inc.*, 1 Cir., 1961, 288 F. 2d 302; *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 1 Cir., 1963, 324 F. 2d 652. Plaintiff’s burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism ‘plus’.”

See also *United States v. Standard Oil Co.*, 316 F. 2d 884 (7th Cir. 1963), *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1963), *Brown v. Western Mass. Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 195 F. Supp. 85 (D. N.J. 1961), *aff’d.*, 306 F. 2d 61 (3rd Cir. 1962), *cert. den’d.*, 371 U.S. 951 (1963), *Eastern Fireproofing Co. v. U.S. Gypsum Co.*, 21 F.R.D. 292 (D. Mass. 1958), and *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286, 301 (S.D. N.Y. 1954, *aff’d.*, 225 F. 2d 289 (2nd Cir. 1955)).

Appellants’ approach to Whirlpool’s refusal to sell Manfree is overly simplified and indeed their approach to the doctrine of conscious parallelism generally is distorted and erroneous.

The first defect in their position lies in their failure to recognize that even conscious parallelism is meaningless standing alone and assumes significance only in conjunction with other meaningful facts from which a jury can reasonably and logically infer, rather than speculate, that the parallel action stemmed from agreement, not individual actions. The second fallacy of their position is their utter failure to recognize that the record is totally void of evidence that Whirlpool acted with knowledge of the actions of others. Thus appellants have failed to dis-

tinguish those cases where only conscious parallel behavior was shown, requiring directed verdicts at the close of plaintiff's proof (such as *Independent Iron Works, Inc. v. United States Steel Corporation*, 322 F. 2d 656, 9th Cir. 1963 and *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 324 F. 2d 652 1st Cir. 1963), and those in which some meaningful "plus factors" were demonstrated in addition to the defendant's conscious parallel behavior, and the Court thus found sufficient evidence to permit a jury to determine whether a conspiracy existed.

Speciously, appellants' brief relies almost *in toto* on cases in which these "plus factors" were present to support its conclusion that proof of a common refusal to deal is *alone* sufficient to submit a case to the jury. (Appellants' Brief, p. 94-96). The most flagrant example of appellants' misplaced reliance on the cases they cite is their reliance upon *Milgram v. Lowes, Inc.*, 192 F. 2d 579, 583 (3rd Cir., 1951) cited for the proposition that uniformity in refusing to sell alone forms the basis of a permissible inference of joint action. (Appellants' Brief, p. 95). The Court there specifically restricted its holding to the facts presented which included a plus factor, (all defendants acted in contradiction to their self-interests) stating:

" . . . this does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, *in themselves*, from which a Court may infer concerted action. *Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self-interest.* This strengthens considerably the inference of conspiracy, for the conduct of the distributors, is, in the absence of a valid explanation, inconsistent with decisions independently arrived at." (p. 583) (Emphasis supplied)

Certainly it cannot be said that Whirlpool's refusal to change its long-established distribution policy was in contradiction to its best interests. Both the cases of *Standard Oil Co. of California v. Moore*, 251 F. 2d 188 (9th Cir. 1957) and *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196 (9th Cir. 1963) heavily relied on by the appellants in their brief likewise contained plus factors, not present here. The General Motors case (*United States v. General Motors Corp.*, 384 U.S. 127 1966) is distinguishable as there was clear and convincing evidence of an agreement and conspiracy.

While arguing at page 95 of their brief that uniformity in refusing to sell alone forms the basis for an inference of conspiracy, appellants tacitly recognize that such proof is insufficient by attempting, albeit abortively, to create the illusion of some "plus factor". They argue, without support in the record, that Whirlpool's conduct was motivated by a desire to maintain its suggested, though most frequently non-existent, list prices and by pointing to the advertising policy of Meyer and others, policies which were unknown to Whirlpool.

Appellants have not, and indeed they cannot, point to one instance in which Whirlpool evinced any interest in maintaining its or any suggested list prices. Whirlpool's suggested retail prices never became a part of Meyer's pricing structure, nor was Whirlpool consulted by Meyer in establishing that company's own suggested retail prices. (Tr. 649)

Refuting appellants' contention that Whirlpool was interested in maintaining its suggested retail prices is appellants own exhibit (Ex. 5115). This study reveals that in approximately 40% of the instances considered the suggested retail price of Whirlpool and that of Meyer differed. Furthermore, this study was patently incomplete

because of the failure to give any consideration to the numerous instances where Meyer suggested retail prices on items for which Whirlpool had no suggested prices. Also evidencing Whirlpool's total lack of interest in maintaining its suggested retail prices is its abandonment of their use after mid-1961 and the fact that prices on Whirlpool products were all over the lot. (Tr. 5029)

Even if, contrary to the fact, the evidence had revealed that Meyer suggested retail prices to dealers that were constantly the same as or were based upon those suggested by Whirlpool as appellants repeatedly, though erroneously argue, such proof would not aid appellants. It is still the law that mere suggestion of retail prices does not violate the Sherman Act. (*United States v. Colgate and Company*, 250 U.S. 300, 1919; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 1960). Nor does voluntary adherence thereto, even with knowledge that failure to do so will result in the termination of business relations, constitute a conspiracy between seller and buyer. (*Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 3rd Cir. 1963). Therefore, no inference of conspiracy can arise from the fact that Whirlpool did suggest or any person had voluntarily followed such suggested retail prices.

Appellants' attempt to create an illusion of illicit purpose from the evidence of suggested retail prices and advertising policies becomes even more untenable in view of their total failure to prove that Whirlpool knew of the "no cut price" advertising policy of Meyer or any other alleged conspirator. Faced with a record completely void of evidence of such knowledge or any facts from which such knowledge could be inferred appellants make a strained attempt to support their contention of knowledge at pages 92, 124 and 132 of their brief, arguing without facts to support the argument, at page 92 that the "practice must have been known and approved by the manufacturer" and

at page 124 with reference to Mr. Walker's testimony directly denying knowledge of such practice (Tr. 5028); ". . . Whirlpool knew that San Francisco retail price margins on the subject goods were higher than elsewhere because of price demands made by representatives of its key accounts in San Francisco directly to its offices." To say that because one knows that retail prices are higher in San Francisco than in certain other areas, an inference can be drawn that such person knows of a "no cut price" advertising policy of a distributor is a complete non-sequitur. Moreover, Exhibit 4227 to which appellants refer the Court discloses on its face that it contains information received by a Whirlpool representative from Meyer and not, as appellants state, from representatives of dealers.⁸ Exhibit No. 1161 which the appellants cite at page 132 of their brief to support their contention that Whirlpool was shown by "substantial evidence . . . to have been aware of Meyer's utilization of cooperative advertising policies under which a dealer was required to follow retail list prices" is simply a copy of the Meyer advertising agreement with Hales. Mr. Walker testified he had no knowledge of this policy (Tr. 5028); there was no other evidence that Whirlpool was aware of the policy and certainly the existence of the Exhibit itself is no basis for inferring Whirlpool's "awareness" of it.

Nor is Whirlpool charged with knowledge of or responsibility for the advertising policy or actions of Meyer

⁸ Appellants even misquote the document in their brief (page 37) to read ". . . larger margins requested by key accounts". The exhibit contains the word "required" not 'requested'. Appellants also fail to note that the evidence disclosed that the report contained information gleaned from a visit to Meyer by a Whirlpool representative who had just been transferred to San Francisco from a part of the country where the level of prices was lower than San Francisco. (Tr. 5139-5140)

under the doctrine of *respondeat superior* for Meyer was an independent trader and not the agent of Whirlpool. Meyer was a separate corporate entity. Its relationship with Whirlpool is that of buyer and seller. Title and risk of loss passed from Whirlpool to Meyer at the point of shipment. Meyer was obligated to pay for the goods it purchased from Whirlpool monthly (Ex. 1933D-F). Whirlpool is therefore not liable for Meyer's conduct, even had it been tortious, nor could Meyer's knowledge be imputed to it. (*Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 6th Cir. 1943; *Western Fruit Growers Sales Co. v. F.T.C.*, 322 F. 2d 67, 9th Cir. 1963; *Standard Fashion Co. v. Magrane Houston Co.*, 259 Fed. 793, 1 Cir. 1919, aff'd. 258 U.S. 346, 1922; *Hilyer v. Union Ice Co.*, 45 Cal. 2d 30, 286 P. 2d 21, 1955; *Bohanon v. James McClatchy Tub Co.*, 16 Cal. App. 2d 188, 60 P. 2d 510, 1936; *Alvarez v. Felker Mfg. Co.*, 230 Cal. App. 2d 986, 1964; *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13, 1964; Restatement Second, Agency § 14J).

Appellants also seek to create the illusion that Whirlpool jumped at the snap of Hale's fingers and gave Hale favored treatment in making advertising funds available for it and in furnishing it special models. The sum and substance of the evidence on Whirlpool's advertising and promotional allowance funds is that Whirlpool matched funds with the distributor to be used to advertise and promote RCA-Whirlpool brand merchandise locally and that these funds could, at the option of the distributor, be run over the names of dealers selected by it.⁹

⁹ These funds were in addition to Whirlpool's regular cooperative advertising program which was based upon a distributor's sales volume.

To support this argument, appellants at no less than seven places in their brief advert to a single instance in 1959 when at the behest of Meyer, Whirlpool allocated \$6,000 which was matched with an equal sum by Meyer to be used for in-store promotions and advertising of RCA-Whirlpool products at Hale's six locations. The program aborted and less than \$3,500 of the money allocated by Whirlpool was used. Moreover, there is no evidence that proportionally equal treatment was not afforded to others. Hence it cannot even be said that this transaction was in any way illegal under the Robinson Patman Act, much less can it be said that it proves conspiracy. As the District Court said, "such evidence in no way constitutes proof of any conspiracy in restraint of trade or any other sinister purpose". (Trial Court Memorandum Opinion p. 11).

In advancing the argument that Whirlpool furnished alleged co-conspirator Hale special models (appellants' brief, p. 40, 100), appellants take an unpardonable liberty with the record to present a meaningless point. Whirlpool did from time to time manufacture and sell to and only to its distributors special or what it describes as variation models. These contained features other than those appearing in its regular line. They were not manufactured to be offered or sold, as appellants contend, only to Hale or so-called key accounts, and there is not one iota of evidence in the record to support this claim. To the contrary, the record clearly and uncontrovertably discloses that these models were available to the distributor to sell to whom he chose. (Tr. 5130-5131). The very document introduced by appellants in which Whirlpool announced the availability of these models to Meyer stated, "Sales to utilities, sales to key accounts and special sales events with *dealers generally* are all possible through aggressive merchandising of this program." (Ex. 1935 Q, R., emphasis added)

While appellants' evidence of suggested retail prices, advertising programs and variation models has no probative value in proving an alleged conspiracy, it is not without value. By attempting to attach anti-trust implications to Whirlpool's commonplace and legitimate business activities through the device of distorting the record, appellants tacitly concede they have no case against Whirlpool.

Appellants also contend that certain other manufacturers and/or distributors provided special models to the alleged co-conspirator-retailers, gave them special advertising allowances and that certain manufacturers and distributors in addition to Meyer geared these allowances to ads featuring only suggested retail prices. But the record is clear that Whirlpool did not know of any such actions.

The sum and substance of all the evidence insofar as Whirlpool is concerned is that its refusal to sell Manfree was strictly a unilateral one made in conformity with its long-established policy to sell only one distributor in northern California and not to sell directly to dealers; that it acted without knowledge of any refusals to sell or to continue to sell Manfree, or the reasons therefor of others including Meyer; that it was without knowledge of or responsible for the advertising policy or other practices of Meyer and others which appellants contend raises an inference of conspiracy.

Hence the record contained no facts from which a jury could reasonably or rationally conclude that Whirlpool knew of, agreed to, or participated in any form of conspiracy, and the action taken by the District Judge in directing a verdict was the only legally correct action warranted by the evidence.

THE RULINGS OF THE DISTRICT COURT EXCLUDING WHIRLPOOL CREATED DOCUMENTS EXHIBITS 5086, 1714 AND 5077 WERE CORRECT, AND IN ANY EVENT HARMLESS.

Appellants complain of the exclusion of certain documents. Three were created by Whirlpool, the balance by others. In this section we will deal with the Whirlpool-created documents; in the next section, with those documents created by others.

(a) Exhibit 5086—Appellants complain because the Court refused to permit them to show that two directors of RCA were also directors of Whirlpool. Such proof would have added nothing to appellants' case. The Court therefore properly excluded this evidence and in any event its exclusion was harmless.¹⁰

(b) Exhibit No. 1714—This Exhibit is a copy of a one-sentence letter from Whirlpool to Meyer which refers to the "attached inquiry." But there was no attachment to the Exhibit, nor was any evidence offered identifying "the attached". Had the Court received the exhibit the jury would have been left to speculate as to the identity of "the attached". Accordingly the Court properly excluded the document. Moreover, if as appellants contend (Appellants' brief page 151), the attachment was Man-free's request to Whirlpool for RCA-Whirlpool products, the exclusion was harmless since it was at all times admitted that Whirlpool referred these requests to Meyer.

¹⁰ Contrary to appellants' brief (page 151) in which they state that there was a "corporate affiliation" and "inter-relationship" between RCA and Whirlpool, the evidence affirmatively reveals that RCA and Whirlpool are and were two distinct corporate entities (Tr. 573-575), and that neither had anything to do with the administration or policies of the other.

(c) Exhibit 5077 (A-D)¹¹—This Exhibit does not show, as appellants state, any discussion by a Whirlpool representative with retailer representatives nor does it disclose, as appellants argue, that Whirlpool gave preferential treatment to Hale. Rather, on its face, the Exhibit is a report of information gleaned by a Whirlpool representative from a visit at the Meyer Company including information that additional advertising funds were being sought for advertising of RCA-Whirlpool products by Hale's, the Emporium and Macy's. There is no evidence they were obtained. The document was irrelevant, its exclusion was proper and in any event harmless.

THE COURT PROPERLY EXCLUDED THE SO-CALLED N.E.M.A. AND A.H.L.M.A. DOCUMENTS—EXHIBITS 2093, 2094, 2095, 2097, 2098, 2099, 3000, 3003, 3004, 3006, 3007, 3010, 431, 3024, 3026, 3036 AND IN ANY EVENT THEIR EXCLUSION WAS HARMLESS.

Appellants complain of the ruling of the Court in excluding the above-mentioned Exhibits purporting to be the minutes of NEMA, in the case of Exhibit 3007 a letter from NEMA, in the case of Exhibit 431 an interoffice communication of the Norge Sales Corporation, in the case of Exhibits 3024 and 3036 a letter from AHLMA to Mr. Bull of Norge Sales Corporation. The rulings of the Court were patently correct for several reasons. First, no foundation was laid for their admission. No evidence was received and none was even proffered to prove that those documents purporting to be minutes of NEMA were in fact such minutes, that they were made in the ordinary course of business at or about the date they bear or that they correctly set forth that which they purport to set

¹¹ Sections A and B of this Exhibit were never offered into evidence. (Tr. 5053-5054)

forth. The “foundation” for these Exhibits constitute no more than the request by Mr. Keith, counsel for appellants, to the Court Reporter during the taking of the deposition of R. D. Smith of NEMA to mark certain documents whose description was read into the record by Mr. Keith, not the witness, and by him described as minutes of NEMA. (See, *e.g.*, Deposition of R.D. Smith, pp. 24, 72-75). Moreover, in the case of Exhibit 3007, the letter, there is no evidence of genuineness or that it was sent or if sent that it was received by Whirlpool. (Tr. 6469) In addition, with respect to Exhibit 3010, purported minutes disclosing a discussion of the definition of mass merchandisers for statistical purposes, the very document relied upon purports to show the names of those present and reveals that Whirlpool was not in attendance.

The “foundation” upon which appellants sought the admission of the so-called AHLMA documents, exhibits 3024, 3026 and 3036 is found at pages 3515-3518 of the transcript. Appellants moved their admission because they were found in the files of Norge Sales Corporation which had been dismissed as a defendant prior to trial. No witness testified and no testimony was proffered identifying or otherwise laying any foundation for the admission of these documents.

Second, the contents of the proffered documents, individually and collectively, neither prove the existence of conspiracy nor are they probative of any act in furtherance of conspiracy. The letter, Exhibit 3007, merely mentions a review of the NEMA standards for computing capacity of refrigerators and contains the personal suggestion of the author that manufacturers affix stickers to refrigerators indicating the capacity as measured by NEMA standards to “enlighten the public”.

The portions of Exhibit 2093 purporting to be minutes of a NEMA meeting of October 10, 1961, upon which appellants seize and in their brief distort, do not, as appellants state at page li of their Appendix, refer to any discussion of any "new phenomena of mass retailing" or imply that the members should share distribution techniques insofar as selling to "discount houses". Rather the Exhibit referred to a discussion which noted "a new phenomena appears to be going on in the field of mass retailing. Many retail outlets are using appliances as a 'come-on' in order to sell clothing and other products," and contained in the next paragraph an unrelated suggestion that the Association might consider sharing information on advancements in distribution such as "techniques in gathering and combining freight . . ." and the possibility that "accounting procedures could be studied to determine wasteful areas."

Exhibits 2094 and 2095 purporting to be NEMA minutes mention the need for gathering from "mass merchandisers" the final destination of products for purposes of securing more accurate information for the Association's county sales statistics.

Exhibit 2097 purporting to be minutes of the Board of Directors of the Consumer Product Division of NEMA dated April 22, 1961, discloses a resolution by that Board to advise all sections of the Division that they are empowered to disclose their statistical activity to non-members subject to the approval of NEMA counsel, and Exhibit 2098 purporting to be minutes of the Electric Dish-Washer Section covering a meeting held one year later on May 25, 1962 discloses that the Electric Dish-Washer Section voted to open the Section's statistical activities to NEMA members only.

Exhibit 2099 does not disclose, as appellants imply at pages liii-liv of their Appendix, that the members of NEMA decided to exchange information among themselves as to sales by price classifications but rather that the members decided to report to *NEMA* the units sold by price classifications such as those models selling at "less than \$95; between \$95 and \$105 . . .; \$156 and over".

Exhibits 3000 and 3004 purport to be NEMA's statistical reports of total industry sales of various appliances.

Exhibit 3003 purports to contain statistics of several Sections of NEMA while Exhibit 3006 purports to be the organizational minutes for the first meeting of the Board of Directors of the Consumers Product Division of NEMA dated January 6, 1960 in which the Board adopted a resolution that in the interest of economy one Committee handle all publicity for all Sections of the Division which related to NEMA; and, contrary to appellants' assertion (Appendix p. viii), there was nothing said to indicate that this Board would coordinate publicity "between manufacturer members." This meeting also reported that AHLMA had adopted a code of advertising practices.

Exhibit 431 was offered during the reading of the deposition of Mr. Judson Sayre of Norge. Appellants, without asking Mr. Sayre or any other witness one question concerning an alleged meeting of NEMA in July, 1960 and without asking Mr. Sayre or any other witness to identify or otherwise lay a foundation for its admission, offered in evidence Exhibit 431, purportedly an interoffice communication of Mr. Sayre to Mr. Bull, both of Norge Sales Corporation, dated July 15, 1960 and a memorandum purportedly handed out at a NEMA meeting the previous day referred to in the inter-office communication. There was no evidence that Mr. Sayre attended such a meet-

ing; much less is there any evidence identifying any others who may have attended the alleged meeting.

Appellants' counsel sought to prove those present at the alleged July 1960 meeting by reading from Exhibits 3006 and 3007 (Tr. 2543), the former purporting to be minutes of a January 1960 meeting of NEMA and the latter being a letter referring to a July meeting but not indicating in any manner who was present. As noted above, both of these documents were themselves excluded for lack of foundation and relevancy. Even if they had been received, they would not have proven who attended the alleged July meeting since one document referred to a January meeting and the other contains no indication of persons attending any meeting. Having completely failed to lay a foundation for introduction of Exhibit 431 as to Whirlpool, it was properly excluded.

Exhibits 3024 and 3036 purport to be no more than industry-wide statistics of inventories and total factory sales with breakdown as to individual companies.

Exhibit 3026 purports to be a letter from AHLMA to Norge Sales Corporation with reference to two meetings attended by counsel for a number of unidentified companies as a result of which at an AHLMA board meeting on October 7, 1959 there was a discussion "as to what might be done to eliminate doubtful advertising practices, fictitious price advertising and to eliminate possible violations of the Robinson-Patman Act, particularly in the promotional allowance area". The only action purportedly taken by those present, and their identity is not disclosed by the Exhibit or any other evidence, was to direct that the Exhibit be sent to the membership and that the subject would be considered in the future.

The foregoing Exhibits were all properly excluded for lack of foundation, and in the case of Exhibits 431, 3007, 3010, 3026 for the additional reason of hearsay. Moreover, those exhibits individually and collectively and those portions taken out of context and distorted by appellants do not, by any stretch of the imagination, support appellants' argument that NEMA or AHLMA were the setting for meetings to discuss price information or to promulgate or to force advertising codes on retailers nor do they disclose, as appellants contend, a "fixed and rigid distribution system with national origins making the boycott one of common purpose and thus easy to enforce and administer."

Obviously recognizing lack of merit in their argument that these documents are probative of improper motives or conduct on the part of the members of NEMA and AHLMA appellants finally cite *American Tobacco Company v. United States*, 147 F. 2d 93 (6th Cir. 1944) and argue that all of these documents were admissible for the purpose of showing that the Associations served as a means of communication and gave appellees an opportunity to conspire and act in combination. Even if it be assumed *arguendo* that appellants had laid a proper foundation for the admission of these documents, and that they would serve to prove that appellees had an opportunity to conspire, they prove no more. The charge here made and that which appellants were required to but did not prove was conspiracy, not opportunity to conspire.

THE EXCLUSION OF PORTIONS OF THE DEPOSITION OF ARTHUR ALPINE WAS PROPER AND IN ANY EVENT HARMLESS.

Although the entire deposition of Mr. Alpine who died before his deposition was completed could have been excluded because of the failure of the witness to sign it (Fed-

eral Rule of Civil Procedure 30e, 3 Wigmore, *Evidence* §805, 3rd Ed. 1940), the Court did not order such exclusion. Rather, he excluded only those portions which alluded to the deponent's memoranda and notes of conversations with certain representatives of appellees (Tr. 6277), documents that, although requested had not been turned over to appellees prior to deponent's death. As to these portions of the deposition, the appellees had been deprived of the right to cross-examination and hence their exclusion was entirely proper.

Moreover, the exclusion as far as Whirlpool is concerned was also harmless since it contains no testimony concerning Whirlpool. Appendix A to appellants' brief which sets forth a summary of this deposition (p. xxxii-xxxvii) discloses no conversation with or in the presence of any representative of Whirlpool, and the deposition discloses (p. 210) that Mr. Alpine testified that he did not recall ever having a conversation with any officer or employee of Whirlpool Corporation, and did not know or have any information as to whether any employee of U.S.E. or Man-free had ever had any conversations with any officer or employee of Whirlpool Corporation.

All the conversations to which he testified were conversations outside of the presence of any Whirlpool representatives and hence clearly hearsay as to it and therefore properly excluded for that reason also.

THE COURT PROPERLY EXCLUDED PROFFERED TESTIMONY AND EXHIBITS WHICH WERE HEARSAY AS TO WHIRLPOOL, OTHERWISE INADMISSIBLE AND IN ANY EVENT THEIR EXCLUSION WAS HARMLESS INsofar AS THIS APPELLEE IS CONCERNED.

Appellants claim that the exclusion of certain conversations between representatives of appellants and claimed

representatives of the alleged co-conspirators was error. As to appellee Whirlpool these conversations were all hearsay, and properly excluded on the basis of the well-established rule that the declarations of an alleged conspirator, whether or not a defendant are not admissible against any other alleged conspirator unless and until a *prima facie* case of a conspiracy has been proven as to both. Further, the statements must be authorized by the principal and be made during the existence of the conspiracy and in the execution of the common design. (*Standard Oil Co. of California v. Moore*, 251 F. 2d 188, 210, 9th Cir. 1957; *Flinthote Co. v. Lysfjord*, 246 F. 2d 368, 386, 9th Cir. 1957). As has been previously shown, the appellants have failed to establish a *prima facie* case of conspiracy against Whirlpool. Hence the statements of or with alleged co-conspirators outside the presence of Whirlpool were not admissible against Whirlpool. Included in this category are the following:

(a) Testimony of Bernard Freeman of appellants with reference to a conversation with Jack Mitchell of alleged co-conspirator Lancaster and with representatives of alleged co-conspirator General Electric. (Appendix A to appellants' brief p. xxxix, xlvii, and xix).

(b) Testimony of Marvin Boyd of appellants with reference to conversations with Mr. Newby of alleged co-conspirator Westinghouse, with Mr. Erickson of alleged co-conspirator Hotpoint. (Appendix A to appellants' brief p. xl and xliii).

(c) Testimony of Jack Hangauer of alleged co-conspirator Westinghouse as to his opinion on the market conditions in the San Francisco area. (Appendix A to appellants' brief p. xlii)

(d) Testimony of William Mayben of alleged co-conspirator Graybar with reference to a conversation with representative of alleged co-conspirator Hotpoint. (Appendix A to appellants' brief p. xlv)

(e) Testimony of Joseph Valenson of alleged co-conspirator California Electric with reference to a conversation with Bernard Freeman of appellants. (Appendix A to appellants' brief p. ii)

(f) Testimony of Bert Green of appellants with reference to a conversation with Mr. Bonnet of alleged co-conspirator Graybar. (Appendix A to appellants' brief p. xi)

(g) Testimony of Joseph Mittleman of appellants with reference to a conversation with representatives of the alleged co-conspirator newspapers (Appendix A to appellants' brief p. vi)

(h) Testimony of Vern Brown of alleged co-conspirator Graybar with reference to a conversation with representatives of alleged co-conspirator Hotpoint (Appendix A to appellants brief p. xvii)

(i) Testimony of A. H. Meyer, of alleged co-conspirator Meyer with reference to conversations with representatives of alleged co-conspirator RCA (Appendix A to appellants brief p. xxiii, xxiv)

The numerous Exhibits referred to in Appendix A to appellants' brief and not otherwise heretofore discussed in prior sections of this brief were likewise hearsay as to appellee and hence inadmissible as to it. For this reason it becomes unnecessary to discuss other grounds for

the rejection thereof such as lack of foundation and lack of authority of the declarant.¹²

Moreover, none of the proffered testimony or excluded exhibits would, if admitted, establish that Whirlpool was a party to a conspiracy.

THE EXCLUSION OF EXHIBITS 5068 AND 5082, WORK PAPERS OF MR. HONIG WAS PROPER, AND IN ANY EVENT HARMLESS.

Appellants contend that the rejection of these Exhibits, prepared by Mr. Honig, their accountant, offered as visual aids in support of the already admitted Exhibit 5115, a comparison of Whirlpool and Meyer suggested list prices, was error. The proffered documents simply contained the underlying data supporting the conclusions in Exhibit 5115 which was already received in evidence. The Court therefore properly rejected these as being cumulative, and in any event their rejection was harmless because the information contained in them was already in evidence.

¹² Obviously with tongue in cheek appellants argue at pages 22 and 169 of their brief that the Court erroneously distinguished between documentary evidence offered as to one conspirator and oral declarations so offered, by admitting all the proffered documents, but refusing to admit the oral declarations of one defendant against all. The Court did not admit all documents against all defendants. If he did appellants would not have devoted thirty pages of their brief to claimed errors in refusing to admit documents. The citations to which appellants refer the Court in this tongue in cheek argument (Tr. 6854) discloses that the Court was referring to and admitted only those documents that were then under consideration.

**THE COURT PROPERLY DELINEATED THE ISSUES
AS RAISED BY THE PLEADINGS.**

Appellants contend at page 130 of their brief that in addition to the single conspiracy involving numerous brands of TV's and major appliances their *one count* complaints charged in paragraphs 7(a) (b) and 10 and their proof and proffered proof established *prima facie* cases of several vertical and disconnected conspiracies including one between Whirlpool, Meyer and Hale to fix and maintain retail prices on appliances and to boycott appellants pursuant thereto.

In paragraph 7 of their complaints to which appellants specifically refer this Court, they allege one, not several conspiracies. They allege that defendants and others restrained trade in the distribution of TV sets and major household appliances in San Francisco and that

“defendants . . . have and continue to do the following things pursuant to and in furtherance of *the said combination and conspiracy*.” (emphasis added)

Subparagraphs (a) and (b) set forth acts allegedly committed in furtherance of the alleged conspiracy. Paragraph 10 to which appellants also refer this Court states “Each of the retail store operating members of *the conspiracy . . .*”

Thus the very language contained in those paragraphs of the complaints relied upon by appellants in support of their argument that the complaints charge numerous vertical conspiracies effectively refute the argument. These paragraphs, as do the remainder of the allegations (see paragraphs 8, 13 and 14) refer to one and only one conspiracy and though the complaints set forth numerous alleged acts in furtherance of the alleged conspiracy, appellants' claim of conspiracy was clearly set forth in the

singular. Hence the Court properly interpreted the complaint.

Moreover, even if it be assumed *arguendo* that the complaints charged separate vertical conspiracies including one between Whirlpool, Meyer and Hales, appellants' proof and offer of proof was not sufficient to establish a *prima facie* case against Whirlpool. The offer contained no proffer of evidence over and beyond that offered in support of the charge of a single conspiracy, and appellants counsel advised the Court that the evidence of separate conspiracies was the same as that claimed to show a single conspiracy. (P. Tr. July 23, 1965 p. 7).

It would unduly lengthen this brief to restate the reasons why the Court correctly excluded the proffered evidence and why the evidence in the record and all that was proffered, even if received, would no more establish that Whirlpool was a party to a separate vertical conspiracy than a single conspiracy. Suffice it to say that the record discloses no evidence that Whirlpool was aware of or participated in any conspiracy, horizontal or vertical. Accordingly, if it be assumed *arguendo* that the Court erred, the error was harmless insofar as that ruling applies to Whirlpool.

THE COURT PROPERLY SEPARATED THE TRIAL ON THE ISSUES OF LIABILITY AND DAMAGES, AND IN ANY EVENT THE SEPARATION WAS HARMLESS.

Nor was there any error committed or harm resulting from the Court's order separating the issue of liability from that of damages.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

“The court in furtherance of convenience or to avoid prejudice may order a separate trial . . . of any separate issue or . . . issues.”

Whether issues should be separated is a question directed to the sound discretion of the trial court. Thus this Court in *Richmond v. Weiner*, 353 F. 2d 41, 44-45 (9th Cir. 1965) held:

“A Federal trial court in its discretion may upon its own motion properly separate an issue from others and confine the introduction of evidence to that separated issue alone if the court in the exercise of reasonable discretion thinks that course would save trial time or effort or make the trial of other issues unnecessary . . . Whether there should be severance and separate trial of an issue is primarily a question concerning the court’s trial procedure and convenience, not a question concerning the merits of the case.” See also *Ammensmaki v. Interlake S. S. Co.*, 342 F. 2d 627, 7th Cir. 1965; *Durham v. Southern Ry.*, 254 F. Supp. 813, D. C. Va. 1966; *Mannke v. Benjamin Moore & Co.*, 251 F. Supp. 1017, D. C. Pa. 1966; *Cataphote v. DeSoto Chemical Coatings, Inc.*, 235 F. Supp. 931, D. C. Cal. 1964.

Anti-trust cases present those problems which make the separation of issues desirable. See *Orbo Theatre Corporation v. Loew’s, Inc., et al.*, 156 F. Supp. 770, 1957, aff’d. 261 F. 2d 380, D. C. Cir. 1958; *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, N. D. Ill. 1957, modified sub nom., 258 F. 2d 831, 7th Cir. 1958; *Reines Distributors, Inc. v. Admiral Corporation*, 257 F. Supp. 619, S. D. N. Y. 1965; see also *Independent Ironworks, Inc. v. United States Steel Corporation*, 177 F. Supp. 743, N. D. Cal., 1959.

Thirty-eight trial days were consumed by appellants in presenting their case of “liability”. While one can merely

surmise how much additional time would have been consumed had the court not separated the issues, freeing the court, the jury and the litigants from spending *any* time devoted to the presentation of evidence of alleged damages in view of appellants' failure to prove a *prima facie* case of liability would seem to establish beyond question, not only that the trial court did not abuse its discretion, but the soundness of the court's order separating the issues.¹³

THE COURT PROPERLY EXCLUDED THE STUDIES PURPORTING TO SHOW THE RETAILERS' TAG PRICES, AND IN ANY EVENT THE EXCLUSION WAS HARMLESS.

Appellants complain of the Court's exclusion of Exhibits 1560 to 1681 purporting to be studies showing a comparison of distributors and certain manufacturers suggested list prices with the tag prices of Hales (Exhibits 1561-1578), Lachman (Exhibits 1579-1681) and Redlick (Exhibit 1560). Appellants contend that these studies establish that the suggested retail prices and the tag prices were the same. The exclusion of these Exhibits insofar as Whirlpool is concerned was proper and in any event harmless for several reasons. First, the studies did not purport to compare prices suggested by Whirlpool but rather prices suggested by Meyer, an independent distributor, whose suggested prices were promulgated and issued without any participation by or consultation with Whirl-

¹³ Appellee would further note that had the issue of liability been submitted to and determined by the jury against appellees or any of them, the same jury would have heard evidence of and determined the question of damages so that separation in that event would likewise not have been harmful.

pool.¹⁴ (Tr. 649). Secondly, since the record contained no independent proof of conspiracy much less that Whirlpool was a conspirator, these Exhibits were hearsay and hence inadmissible against this Appellee.

In addition, the conspiracy is alleged to have taken place in San Francisco. Appellants admit that the Exhibits were prepared from orders for stores of the alleged conspirators in San Francisco and elsewhere. (Tr. 6380-6381). Insofar as the record is concerned all of the orders may have involved stores other than those located in San Francisco. Further the documents on their face reveal that they contained assumptions of the witness. For example, Exhibit 1558 has the remark "apparently special numbers". The witness through whom appellants sought to introduce these documents was an accountant and had no personal knowledge of the industry or the transactions shown on the summaries. He could not have testified orally as to whether or not a particular model was or was not a "special model" and this was not shown on the underlying documents from which the "summaries" were made. Obviously he should not be permitted to do by indirection—the introduction of his summary—that which he could not do directly.

Moreover, neither the suggestion of nor voluntary adherence to suggested prices is illegal, and the record disclosed no agreement on the part of Whirlpool to maintain suggested prices. Accordingly, the exclusion was certainly harmless.

¹⁴ After July 1961 Whirlpool made no suggestion of retail prices and during the period when it did, appellants' own Exhibit (Tr. 5115) discloses that Whirlpool's suggested retail prices and those of its distributor, Meyer, differed in 40% of the instances considered.

THE COURT PROPERLY DENIED REQUESTS FOR DISCOVERY OF DOCUMENTS AND CORRECTLY SUSTAINED OBJECTIONS TO INTERROGATORIES AND IN ANY EVENT ITS RULINGS WERE HARMLESS.

(a) Appellants claim that the denial of Item 15 of its First Motion for Production of Documents of June 5, 1964 (R. 422, 425) was error. (Appendix A to appellants' brief, p. lxii; appellants' brief, p. 172) This Item sought production of:

“All intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above-named or the retail defendants above named during the above period of time.” (emphasis added)

This request was too broad and hence lacked the requisite showing of “good cause”. (Rule 34 Federal Rules Civil Procedure; *United States v. Great Northern Ry.*, 18 F. R. D. 357, N. D. Cal. 1955).

A retail defendant's complaint about the quality of a product and similar documents which obviously would not be relevant to this litigation, would be comprehended by the above overly broad request and if allowed would have required Whirlpool to search through all of its records in all of its departments to discover whether they contained *any* documents that remotely related or pertained to any retail defendant regardless of the subject matter thereof. The Court properly held this request too broad, but did order production of those documents to which appellants were entitled (see First Motion for Production of Document Items 12, 17-23, R. 599-600).

(b) Appellants complain of the Court's ruling sustaining Whirlpool's objection to Interrogatories No. 2, 3, 4, 5, and 6 of its First Interrogatories of September 29,

1964. (R. 625-627; Appendix A to appellants' brief, p. lxiii; appellants' brief, p. 174) Interrogatory No. 2 asked:

"State whether or not there exists a written statement or written statements or reports reflecting any conversations between an employee, officer, agent or representative of your company, . . . and any other person having to do, . . . with the acquisition, sale or advertising of television sets or major household appliances by the plaintiffs in the above-entitled action . . . or the retail defendants in the above-entitled action . . ."

Interrogatories No. 3, 4, 5, and 6 requested the dates, locations and custodians of such documents and whether or not they were claimed to be privileged.

These Interrogatories suffered from the same malady of being overly encompassing and broad as did the foregoing request for documents. The acquisition, sale and advertising of such products by retail dealers embraces a wide range of activities which could have no possible relevance to the issues in this case—an alleged conspiracy to boycott the plaintiffs and to maintain suggested list prices.

When appellants propounded interrogatories which were narrowed to the issues, Whirlpool made answer thereto. Thus Whirlpool responded to appellants' Second Interrogatories Directed to All Defendants (December 7, 1964; R. 790, 791-792) in which appellants inquired into the existence of any statements, reports, memoranda or documents reflecting conversations between officers or employees of defendants with respect to any "agreement, understanding, policy, stated or suggested, concerning retail prices and terms and conditions thereof, in which household appliances or television sets have been sold, shown for sale or

advertised for sale during the applicable period by the retail defendants in this action.” (Interrogatories Nos. 4 and 5).

(c) Appellants complain of the denial of the production of certain documents described under Items 20, 22 (c)-(e) and 27(f) in their Second Motion for Production of Documents. (November, 1964; Appendix A to appellants’ brief, p. lxiii; appellants’ brief, p. 175).

The gist of Item 20 (to which Whirlpool did not object), was a request for all letters received by the defendants from the appellants and any memoranda concerning these letters. This item was granted as to any writings on the original letters received from appellants and any inter-office memoranda relating to said letters. (Order on Motion of Plaintiffs for Production of Documents p. 3, R. 1019). It is difficult to perceive appellants’ complaint concerning this ruling since it denied them only copies of Whirlpool letters sent to them, the originals of which were received by appellants and placed in evidence.

Appellants complain of the denial of Item 22(c) and 22(d), the former requesting the production of letters concerning conversations between Whirlpool and its distributor with reference to preventing the appellants from obtaining major appliances, and the latter requesting documents with reference to letters between Whirlpool and its distributor as to conversations with officers or agents of retail dealers concerning prices, suggested prices or advertising. Whirlpool did not object to these portions of Interrogatory 22, and more important, production of almost all of these documents had been previously ordered by the Court. (Appellants’ First Motion for Production of Documents Items 18 and 19, R. 599-600) Further in answer to appellants’ Second Interrogatories referred to

above, Whirlpool specifically stated that *no* statements, reports, memoranda or *other document existed* as to any conversations between a Whirlpool officer or agent in which U. S. E. or Manfree were mentioned, and also that *no* statement, report, memoranda or *other document existed* of any conversations between Whirlpool's officers or agents and those of an officer or agent of any other defendant as to any agreement, understanding or policy concerning stated or suggested retail prices at which household appliances or television sets have been sold, shown for sale, or advertised for sale during the applicable period by the retail defendants in this action. (Plaintiffs' Second Interrogatories Nos. 1, 2, 4, 5, R. 1050-1052) Hence, insofar as Whirlpool is concerned, no documents of the type requested by appellants existed and the denial of its request for production was proper and harmless.

Item 22(e) requested letters of Whirlpool to its distributor concerning the "sale or possibility of sale" to certain specified discount stores in the San Francisco area. This correspondence had previously been ordered produced by the Court's order of September 8, 1964 to produce correspondence to the distributor concerning whether "RCA-Whirlpool major household appliances should be sold to plaintiffs or any other discount house in the San Francisco Bay area." (Appellants' First Motion for Production of Documents Items 18 and 19, R. 599-600)

Item 27(f) requesting documents and notes of certain trade association meetings which pertained to Discount Department Stores or Mass Merchandising Stores was properly denied as appellants failed to meet the requisite showing that any such documents existed or were in the possession or custody of Whirlpool. (*William A. Meier Glasgow v. Anchor Hocking Glass Corp.*, 11 F. R. D. 487,

491, 1951). Appellants deposed representatives of such trade associations which had custody of such documents. Further, the appellants had been granted, in their First Motion for Production of Documents (R. 599-600), their requests for the type of documents relating to this subject that might have been in Whirlpool's possession; namely, all speeches of any officer or sales manager of Whirlpool to any association pertaining to selling discount stores or mass merchandising stores. (Item 22).

(d) Contrary to appellants' statement that the Court refused to require Whirlpool to answer Interrogatories Nos. 1, 2 and 6 of Appellants' Second Interrogatories addressed to all defendants (Appendix A to appellants' brief, p. lxiii), the Court ordered these interrogatories answered but limited the answer of these overly broad interrogatories to information available to Whirlpool, its officers and employees whose responsibility involved the sale or advertising in Northern California of Whirlpool products and further struck the words "by implication" from Interrogatories 1 and 2, which asked in part for statements, reports, etc., where U. S. E. or Manfree were mentioned (separately or in any other way) expressly "or by implication".

Appellants claim that the order sustaining objection to Interrogatory No. 3 of appellants' Second Interrogatories (Appendix A to appellants' brief, p. lxiii) was error. This Interrogatory asked for the existence of any statements, reports or memoranda reflecting any conversations during the applicable period "between your attorneys" and any officer or agent, employee or other person acting in behalf of any defendant in this litigation in which U. S. E. or Manfree were mentioned. The Court properly denied this Interrogatory as this was an obvious attempt to invade the work product of Whirlpool's attorneys. (*Trans-*

mirra Product Corp. v. Monsanto Chemical Co., 26 F. R. D. 572, 578-580, S.D. N.Y. 1960).

THE EVIDENCE AS TO THE KLOR'S LAWSUIT AND THE TESTIMONY OF MR. FRACTENBERG WERE PROPERLY EXCLUDED.

Appellants claim that the Court improperly excluded the proffered testimony of Mr. Sam Fractenberg who previously had been an officer of Klor's, Inc. and the deposition testimony of Mr. Klor taken in a different case. In contravention to local Court Rule 4 (11) the appellants failed to list Mr. Fractenberg or any other Klor's witness in their pre-trial statement. The appellants' failure to list this witness as required by the rule was grounds for the exclusion of this testimony.

Moreover, the proffered deposition of Mr. Klor that was taken in *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (359 U.S. 207, 1959) was properly excluded as to Whirlpool because, though Whirlpool was originally a party to that suit, before the time the Klor's deposition was completed it had been dismissed as a party and hence admission of the deposition testimony of Mr. Klor would have denied Whirlpool the right of cross-examination. Also, this testimony which would have been simply a rehash of events from June, 1955 to January, 1957 (Tr. 5668; 5681-5682), was further not relevant to the issues before the Court as it involved collateral and unrelated matters.

THE DISTRICT COURT PROPERLY TAXED CERTAIN COSTS.

Section 28 U.S.C. §1920(a) (1964) permits the taxation of "stenographic transcripts". Each one of the categories of costs claimed by the appellants to have been improperly taxed—trial transcripts, depositions, pre-trial transcripts,

and reproduction of Exhibits, were held to be properly taxable in cases in this very court. (See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656, 1963; *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F. 2d 190, 1964; see also *Pearlman v. Feldman*, 116 F. Supp. 102, D. Conn. 1953). Certainly, it cannot be said that the trial court overstepped the bounds of its discretion, in taxing the foregoing costs to appellants in this complex and involved case.

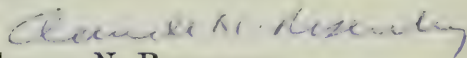
CONCLUSION

For the foregoing reasons we respectfully submit that the judgment for appellee, Whirlpool Corporation, should be affirmed.

APR 24

Dated:, 1968.

Respectfully submitted,



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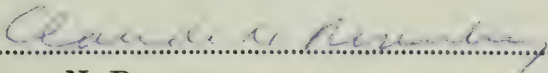
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ARNSTEIN, GLUCK, WEITZENFELD & MINOW

Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


.....
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